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STATE OF WISCONSIN

IN SUPREME COURT

AUGUST TERM, 1939.

No. 97

F. W. WOOLWORTH CO., a foreign corporation,

Appellant,

vs.

WISCONSIN TAX COMMISSION,

Respondent.

CASE

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This is an appeal from a judgment rendered in the Circuit Court for Dane County, Wisconsin, the Honorable August C. Hoppmann presiding, on the 10th day of June, 1939, which said judgment confirmed an order of the Wisconsin Tax Commission dated December 19th, 1938 which levied an assessment upon the appellant under the so-called Wisconsin Privilege Dividend Tax law and denied a claim of the appellant for refund of a portion of the tax paid. The decision of the Wisconsin Tax Commission denied the claim for refund by the appellant in the sum of $2515.61 and further levied an additional tax of $20,282.68.

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137-157 NOTICE OF APPEAL TO THE CIRCUIT COURT FOR DANE COUNTY FROM DECISION AND ORDER OF THE WISCONSIN TAX COMMISSION.

(Title omitted.)

137 *To The Wisconsin Tax Commission, Madison, Wisconsin:*

PLEASE TAKE NOTICE that the *F. W. WOOLWORTH. CO.* hereby appeals to the Circuit Court for Dane County, Wisconsin, from the whole of the order and decision of the Wisconsin Tax Commission which was served by registered mail upon appellant on December 27, 1938, and which bears date the 19th day of December, 1938, a copy of which said order and decision is hereto attached, marked Exhibit I, and is hereby referred to and made a part of this notice.

OBJECTIONS TO ORDER AND DECISION AND TO ASSESSMENT AND DENIAL OF REFUND.

The objections to said order and decision and to the assessment made and to the denial of refund on such portion of alleged tax as was paid, are stated as follows:

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138 (1) The assessment and the order denying refund are void and of no effect whatsoever by reason of the fact that the purported law on which the said assessment and purported tax is based is unconstitutional under both the Constitution of the United States of America and the Constitution of the State of Wisconsin, and particularly under the Fourteenth Amendment of the Constitution of the United States of America; Article I, Section 1, Constitution of the State of Wisconsin Article I, Section 8, Constitution of the United States of America; Article I, Section 10, Constitution of the United States of America; Article I, Section 8, Constitution of the State of Wisconsin; Article I, Section 12, Constitution of the State of Wisconsin; Article IV, Section 1, Constitution of the United States of America.

(2) That said assessment, insofar as it includes any so-called dividends on treasury stock, as part of the base upon which the alleged privilege dividend tax is computed, is void and of no effect whatsoever by reason of the fact that the law does not contemplate that dividends on treasury stock should be included in such base.

STATEMENT OF FACTS UPON WHICH APPELLANT RELIES AS CONSTITUTING BASIS OF THIS APPEAL.

From the record herein made before the Wisconsin Tax Commission it appears that the F.

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W. Woolworth Co. is a New York corporation engaged in the business of operating a retail merchant business in twenty - nine states of the United States and also in the District of Columbia and Cuba. The company also owns all or part of the stock of corporations engaged in a similar business in the other nineteen states of the United States and also in Canada, Great Britain and
139 Germany. The statutory principal office of the company at which meetings of the stockholders are held is at Woolworth Building, Watertown, New York, and the principal business office at which meetings of directors are held is at Woolworth Building, New York, New York. The said F. W. Woolworth Co. is qualified to do business in the State of Wisconsin, but has no executive office of any kind located within the State of Wisconsin.

Under the formula used by the Tax Commission the total adjusted net income for the year 1934 was $27,808,579.19, for the year 1935 $24,606,991.08, and for the year 1936 $25,102,593.64. While the Taxpayer does not concede that these figures so used by the Wisconsin Tax Commission are accurate, no question is raised with respect thereto on this appeal.

The amount of such net income allocable to Wisconsin under the formula used by the Wisconsin Tax Commission for the year 1934 was $555,538.44, for the year 1935 $579,547.66, and for the year 1936 $576,522.38. The percentage of total net income allocable to Wisconsin on the basis of the formulae so used by the Wisconsin

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Tax Commission was 1.9977% for the year 1934, 2.3552% for the year 1935 and 2.2966% for the year 1936.

On each December 2, 1935, March 2, 1936, July 1, 1936, September 1, 1936, December 1, 1936 and March 1, 1937, the F. W. Woolworth Co. declared a dividend upon all of its outstanding shares of stock and paid a total on each of said dates of $5,882,167.80 in dividends exclusive of so-called dividends on shares held in the treasury, and made payment of so-called dividends on treasury stock of $27,832.20 on each of said dates. Under date of January 24, 1936 the F. W. Woolworth Co. paid to the Wisconsin Tax Commission the sum of $2515.61, under a return made to the Wisconsin Tax Commission of the dividend paid by the company on December 2, 1935. This payment was specifically made under protest, as appears
140 from the protest marked Exhibit 2 which it attached to the return and is part of the record before the Tax Commission.

By notice of additional assessment dated July 16, 1937, the Wisconsin Tax Commission assessed an additional privilege dividend tax in the principal amount of $17,959.19 together with interest and penalties, with respect to the dividend hereinbefore referred to. This assessment was made pursuant to Chapter 505 of the Wisconsin Laws of 1935 effective September 26, 1935, as amended by Chapter 552 of the Laws of 1935 effective October 9, 1935, Chapter 233 of the Laws of 1937 effective June 15, 1937, and Chapter 309 of the

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Laws of 1937 effective July 1, 1937. As stated before, the Wisconsin Tax Commission determined that the percentage of the 1934 income allocable to Wisconsin was 1.9977%, that the percentage of 1935 income allocable to Wisconsin was 2.3552%, and that the percentage of 1936 income allocable to Wisconsin was 2.2966%. After multiplying dividends (exclusive of those on treasury stock) paid on December 2, 1935 by .019977, and dividends (exclusive of those on treasury stock) paid in the calendar year of 1936 by .023552, and the dividends paid on March 1, 1937 (exclusive of those on treasury stock) by .022966, the resulting figures were multiplied by the rate of tax fixed by the Wisconsin Tax Commission (.025641), deduction was made on account of the payment made under protest hereinbefore referred to, penalties and interest were added, and the final figure was the amount of the assessment so determined. Under the decision of the Wisconsin Tax Commission of December 19, 1938, the rate of tax fixed by the Wisconsin Tax Commission was reduced from .025641 to .025 but all so-called dividends on treasury stock were added to the dividends upon which computation had theretofore been made, and it was ordered that the privilege dividend tax be recomputed to include
141 the so-called dividends on treasury stock of the company. In all other respects the original additional assessment was affirmed. The final additional tax on the dividends in question as ordered by the Wisconsin Tax Commission, together with penalties to February 1, 1939, is reflected by com-

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putations made by accountants of the Wisconsin Tax Commission and is attached hereto and marked Exhibit II.

Application for refund of the tax paid in the amount of $2515.61 on January 29, 1936, was disallowed by the Wisconsin Tax Commission, and the F. W. Woolworth Co. duly filed its application for hearing on the denial of this refund.

F. W. Woolworth Co. also duly filed its original application and amended application for hearing and objection to the additional assessment within the period allowed by law.

Hearing was had on both the application for hearing from the order denying the refund, and on the amended application for hearing and objection to the additional assessment, resulting in the entry by the Wisconsin Tax Commission of the order from which this appeal is taken.

There follows a recitation of certain of the details with respect to the F. W. Woolworth Co.'s manner of conducting its operations and disbursing its funds. On each of the dates fixed as a record date for the determination of stockholders entitled to receive each of the dividends upon which a privilege dividend tax has been assessed against the company there has been in excess of 50,000 stockholders of the company residing in all parts of the world, owning an aggregate of 9,703,-613 shares (exclusive of treasury stock). On each of the said dates the number of such stockholders residing in the State of Wisconsin has been not greater than 470 and the number of shares held by such stockholders has been not greater than

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14,597. The exact number of shares held by all stockholders and stockholders resident in Wisconsin on each of said dates, is shown herein as follows:

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Dividend Date	Total Shares (except treasury)	No. of Wis. Shareholders	Total shares held by Wis. residents
12/2/35	9,703,613	457	14,597
3/2/36	9,703,613	437	13,101
6/1/36	9,703,613	437	12,837
9/1/36	9,703,613	464	12,945
12/1/36	9,703,613	470	12,967
3/1/37	9,703,613	468	13,388

All meetings of the board of directors of the company at which dividends were declared were held in the State of New York; all acts of the company or its agents in connection with the declaration and payment of such dividends are performed within and pursuant to the laws of the State of New York, and the funds out of which such dividends were paid were kept in the State of New York. No act or transaction connected with the declaration and payment of such dividends was done within the State of Wisconsin, with the sole exception that certain dividends so declared and paid amounting in the case of each of the dividends to which this appeal relates to less than one-sixth of 1% of all the dividends declared and paid were received by stockholders of the company residing within the State of Wisconsin. The percentage received by residents of Wisconsin on each of the dividend paying dates is shown herein as follows:

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Dividend Date	Total dividends paid (except on treasury shares)	Dividends paid to Wisconsin residents	Per cent of div. paid to Wisconsin residents
12/2/35	$ 5,822,167.80	$ 8,757.20	.1504%
3/2/36	5,822,167.80	7,914.60	.1359%
6/1/36	5,822,167.80	7,696.20	.1321%
9/1/36	5,822,167.80	7,767.00	.1334%
12/1/36	5,822,167.80	7,780.20	.1336%
3/1/37	5,822,167.80	8,032.80	.1379%

143 Dividends were paid by the mailing of a check from the City of New York, New York, to the respective stockholders of record as of the date fixed by the board of directors.

All of the gross income of the company's stores in Wisconsin, after payment of certain expenses, was during the period of time involved on this appeal sent to a district office in the City of Minneapolis, Minnesota, where such income was mingled with funds received from stores in other states. After the payment by the district office of certain other expenses, all surplus funds were transferred by that office to the principal office of the company in New York and deposited in a New York bank to the credit of the appellant. Out of the sums so deposited are paid general corporation expenses, salaries, taxes, dividends, and many other items. All stock records are kept and all dividends are disbursed by City Bank Farmers Trust Company of New York City, which acts as transfer agent and paying agent of the company. Dividends are not paid out of in-

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come received from any particular source or earned in any ascertainable period, but are paid out of the general funds of the company. Regardless of when earned or from where earned, the dividend payment is made by drawing a check or checks for the total amount to the order of the City Bank Farmers Trust Company, which itself makes the actual payments to the stockholders, mailing the same in the regular course of the mails from New York to the respective addresses of the stockholders at the dates fixed by the board of directors. The F. W. Woolworth Co. at no time deducted any of the alleged taxes from the dividends paid to its stockholders.

The application for hearing and the proofs before the Tax Commission at the hearing showed in tabulated form the total amounts received by Wisconsin residents upon the payment of the dividens in question, the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings (based on the computation used
144 by the Tax Commission in reaching assessments, and the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings (on the basis of figures originally used by the Tax Commission). On the basis of the Wisconsin Tax Commission's recomputations as provided by the decision from which this appeal is taken, the tax allocable to dividends received by Wisconsin residents allocable to Wisconsin earnings, would be:

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Dividend Date	(1)		(2)		(3)
12/2/35	$8,758.20 x	.019977	$174.96 x	2½%	$4.37
3/2/36	7,914.60 x	.023552	186.40 x	"	4.66
6/1/36	7,696.20 x	"	181.26 x	"	4.53
9/1/36	7,767.00 x	"	182.93 x	"	4.57
12/1/36	7,780.20 x	"	183.24 x	"	4.58
3/1/37	8,032.80 x	.022966	184.48 x	"	4.61
				Total	$27.32

(1) represents the total amounts received by the Wisconsin residents on the payments of the respective dividends

(2) represents the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings, based on the percentages finally determined to be used by the decision of the Wisconsin Tax Commission

(3) represents the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings.

The record before the Commission further contains undisputed proof that compliance with the statute would require the appellant to perform numerous clerical operations in the State of New York each time a dividend is paid, all resulting in additional expense to the Company.

The record further affirmatively shows that full disclosure has been made to the Wisconsin Tax Commission of all income received by the company and all dividends paid by it, during the period involved on this appeal.

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145 Under date of December 19, 1938, the Wisconsin Tax Commission rendered its decision, a copy of which is attached hereto and marked Exhibit I, wherein it denied the claim for refund made on account of tax paid under protest in respect to the December 2, 1935 dividend, and ordered that the additional assessment was properly made, but that the same should be recomputed at the rate of a straight 2½% rather than at .02564, the rate originally used by the Commission, and also ordered that it should be recomputed so that the dividends on treasury stock should be subjected to tax. It is from this order and decision that the F. W. Woolworth Co. appeals. The recomputation of tax as ordered by the decision is reflected in Exhibit II attached hereto.

ASSIGNMENTS OF ERROR.

(1) The Wisconsin Tax Commission erred in deciding and ordering that the assessment, or any part thereof, was valid and in ordering that the assessment as recomputed be placed on the tax roll.

(2) The Wisconsin Tax Commission erred in refusing to order a refund in favor of the F. W. Woolworth Co. on account of the purported tax paid under protest by said company in the amount of $2515.61 on account of the dividend paid by the F. W. Woolworth Co. on December 2, 1935.

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(3) The Wisconsin Tax Commission erred in its findings and decision and order that the Wisconsin Privilege Dividend Tax law was constitutional as applied to any of the dividends paid by the F. W. Woolworth Co., which are involved in this appeal.

(4) The Wisconsin Tax Commission erred in any event in determining that the Wisconsin Privilege Dividend Tax law was constitutional so
146 far as it was applicable to payments of dividends to such of the stockholders as were non-residents of Wisconsin.

(5) The Wisconsin Tax Commission erred in its findings and decision and order that the assessment should be revised to subject to tax dividends on treasury stock and in ordering a computation of the tax on any base which includes dividends on treasury stock.

(6) The Wisconsin Tax Commission erred in refusing to pass upon the constitutionality of the Wisconsin Privilege Dividend Tax law as applied to the F. W. Woolworth Co.

PROPOSITIONS OF LAW RELIED UPON BY TAXPAYER IN THIS APPEAL.

(1) Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment of the Constitution of the

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United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, in that it deprives the F. W. Woolworth Co. and/or its stockholders of property without due process of law because it attempts to levy an excise tax upon the privilege of paying and receiving dividends out of income derived from property located and business transacted in Wisconsin, when no act in connection with the payment and receipt of such dividends took place within the State of Wisconsin, except the receipt of such dividends as were paid to Wisconsin stockholders.

Furthermore, the funds from which such dividends were paid can not be said to be Wisconsin funds, but are general funds of the company deposited in New York banks and derived from re-
147 mittances from stores and subsidiary corporations in practically all of the states and from several foreign countries.

That the State of Wisconsin has no power to levy any excise tax on the privilege of receiving and paying out dividends since said privilege is not granted by and could not constitutionally be denied by the State of Wisconsin, such privilege being granted under the laws of the State of New York and exercised solely pursuant to the laws of said state.

That even if said law might be held to be constitutional from a jurisdictional standpoint insofar as it levies a tax upon dividends of foreign corporations paid to and received by Wisconsin residents within the state and/or as to dividends paid by Wisconsin corporations, said act so ap-

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plied would be contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article VIII, Section 1 of the Constitution of the State of Wisconsin, since it would be a denial of the equal protection of the laws to residents of Wisconsin and as to Wisconsin corporations it would not be uniform and would contain unreasonable exemptions.

That the tax is on the payment and receipt of dividends and that as it is in part levied upon an unconstitutional subject and as no basis for apportionment exists, the whole assessment is invalid.

That it is apparent from the structure of Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto, under which this tax is assessed, that the legislature contemplated that a tax would be imposed upon all dividends paid from earnings derived from business and property within the state. To restrict the application of the law to dividends received within the State of Wisconsin would so alter and restrict it that it is apparent the legislature would not have passed it in so limited a form. Consequently the entire law is ineffective, notwithstanding the provisions of Section 4 of
148 Chapter 505 of the Laws of 1935 and amendments thereto.

That even if the tax might be held to be valid insofar as it levies a tax on dividends paid to and received by Wisconsin residents within the state, it is invalid insofar as it purports to levy a tax on dividends paid and received outside of Wiscon-

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sin by non-residents of Wisconsin. In such cases the entire payment and receipt of said dividends takes place outside of the State of Wisconsin, and consequently said state has no jurisdiction to levy an excise tax. That all except $27.32 of said assessment represents taxes levied upon the payment of such dividends. This proportion is presented as an alternative and is not to be construed as an admission that the law is valid insofar as it taxes dividends paid to Wisconsin residents or as an abandonment of the principal position taken that the whole law and the tax assessed thereunder is invalid.

(2) That the said law is further unconstitutional under Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, because it is a direct tax upon the F. W. Woolworth Co. stock. The State of Wisconsin has no jurisdiction to tax said stock insofar as it is owned by persons not residing within the state. All of the tax except $27.32 thereof was levied with respect to dividends paid upon stock owned by non-residents of the State of Wisconsin.

(3) That said Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin,

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in that it deprives the F. W. Woolworth Co. of liberty and property without process of law, in that it requires it to file returns, keep detailed
149 figures and accounts, to collect the tax by making deductions from dividends paid, and to perform numerous other acts within the State of New York. The State of Wisconsin has no jurisdiction to require the F. W. Woolworth Co. to do such acts within the State of New York in order to assist it in collecting the tax levied by said section and the amendments thereto.

(4) That said Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, because when declared a dividend becomes a debt of the company. The tax is in effect a direct tax on such debt which has no taxable situs in the State of Wisconsin.

(5) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, because it attempts to levy a tax upon dividends paid from earnings accumulated before its passage. That annual earnings can not be apportioned as to time and therefore the tax is uncon-

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stitutional as to 1936 and 1937 dividends as well as to dividends paid in 1935. Because it is retroactive and in effect a tax upon accumulated surplus, it does not have a taxable situs in the State of Wisconsin.

(6) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article VIII, Section 1 of the Constitution of the State of Wisconsin, because it attempts to impose an excise on the payment and receipt of dividends paid out of Wisconsin earnings. Other earnings are exempt.
150 Said exemption is a denial of the equal protection of the laws and unreasonable. Said tax is also not uniform.

(7) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Article I, Section 10 of the Constitution of the United States of America and under Article I, Section 12 of the Constitution of the State of Wisconsin, because it impairs the obligation of contracts. Said law impairs the contract of the stockholders with the corporation under the general corporate charter and under the dividend resolutions by which the shareholders received a right to the dividends in question. Said law further impairs the contract of the corporation with the States of New York and Wisconsin.

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(8) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Article IV, Section 1 of the Constitution of the United States of America, because it fails to give full faith and credit to the laws of New York and the corporate charter, by-laws and resolutions of the F. W. Woolworth Co. drawn pursuant thereto, which give it the right to conduct its business and declare dividends in the State of New York.

(9) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Article I, Section 8 of the Constitution of the United States of America, because it interferes with the power of Congress to regulate commerce among the several states. Said law interferes with the free transmission of corporate funds from state to state.

(10) Said assessment is further void because the same was calculated pursuant to the statutory presumption under Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto, that the dividends in question were paid from the previous years' income and contain an exact proportionate part of the Wiscon-
151 sin earnings for such year. Such presumption contained in the law in question is plainly not in accord with the true facts and has been rebutted by the proof as made, and if not so rebutted the same is void, as arbitrary and unreasonable and

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unconstitutional under the Fourteenth Amendment of the Constitution of the United States of America and Article I, Section 1 of the Wisconsin Constitution.

(11) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto and the purported tax levied thereunder, is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, in that it deprives the F. W. Woolworth Co. and/or its stockholders of liberty and/or property without due process of law, in that it imposes upon non-resident stockholders what is in effect a tax upon income of such stockholders although such income is not earned within the State of Wisconsin nor derived from property or business conducted within such state.

(12) That said assessment is modified and corrected by the Wisconsin Tax Commission, insofar as it includes as part of the base upon which computation of tax is made so-called "dividends" on treasury stock owned by the company, is void in that Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto does not contemplate that such so-called "dividends" be subjected to tax.

The appellant herein has availed itself of the remedies provided by the Statutes of the State

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of Wisconsin, and particularly Sections 71.12, 71.14 and 71.17.

F. W. WOOLWORTH CO.,

By A. L. CORNWELL,
Vice President,

DAVIES, AUERBACH & CORNELL,
One Wall Street, New York City.

ELA, CHRISTIANSON & ELA,
One West Main Street, Madison, Wis.

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William T. Pullman,
Emerson Ela,
G. Burgess Ela,
Of Counsel.

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Office of

WISCONSIN TAX COMMISSION

MADISON, WISCONSIN

In the Matter of the Appeal of)
) Exhibit I
F. W. WOOLWORTH COMPANY,)
a Corporation,)
)
from an Assessment of Privilege)
Dividend taxes with respect to Divi-)
dends paid on March 2, 1936, June 1,)
1936, September 1, 1936, December 1,)
1936, and March 1, 1937; and from the)
Denial of a Claim for Refund of Priv-)
ilege Dividend Taxes paid with re-)
spect to Dividends paid on December)
2, 1935)

DECISION.

The taxpayer, the F. W. Woolworth Company, appeals to the Tax Commission from a denial of a claim for refund of privilege dividend taxes paid in respect to the dividends paid in December 1935, and more particularly to the question of whether the privilege dividend tax law will be construed to impose a tax with respect to so-called dividends paid on treasury stock.

The taxpayer herein, F. W. Woolworth Company, is a corporation organized under the laws of the State of New York which conducted during the period here involved a retail merchantile

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business in the State of Wisconsin and in other states and foreign countries. Its dividends were declared by the Board of Directors, meeting in New York, New York, and paid by a transfer agent. The method of payment was that one check was issued by F. W. Woolworth Company to the transfer agent for the total amount of the dividends and the transfer agent then prepared and mailed dividend checks to the stockholders

During the period involved, F. W. Woolworth Company held shares of its own stock in its treasury. The check issued to the transfer agent included amounts sufficient to pay dividends upon such treasury shares and dividend checks were received from the transfer agent with respect to such shares. The privilege dividend tax return and the statement of dividends declared and paid did not include the amounts thus transferred with respect to treasury shares, and there is nothing
153 in this case to indicate that F. W. Woolworth Company held treasury stock or that funds were paid to the transfer agent and turned back with respect to such stock until it developed that such was the fact on the hearing of the action on April 23, 1938.

The taxpayer argues that the corporation cannot be said to have derived anything from the treasury stock by virtue of a transaction by which it receives from its own agent a check representing money of which it is already the owner. Nothing is derived by the transfer of money from one account to another. After the transaction the corporation has exactly what it had before. The

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fact, however, is that this taxpayer, a corporation, did declare a dividend on the treasury stock the same as on other stock owned by individuals.

Subsection (1) of the privilege dividend tax law imposes a tax on dividends out of income derived from property located and business transacted in this state, declared and paid by all corporations. Subsection (7) provides that dividends shall be defined as in Section 71.02. The latter section provides in part:

> "the term 'dividends' as used in this section shall be held to mean all dividends derived from stocks whether paid to its shareholders in cash or property of the corporation."

The courts have held that treasury stock is issued capital stock re-acquired by the issuing corporation. Such stock is property of the corporation, an asset which may be sold.

Frank Gilbert Paper Co. vs. Prankard, 204 App. Div. 83, 198 N. Y. S. 25;
Enright vs. Heckscher, 240 F. 863, 153 C. C. A. 549;
Borg vs. Internation Silver Co., 11 F. (2d) 143;
Goldstein-Findberg Co. vs. State Board of Assessors, 83 Atl. 773.

The taxpayer is a New York corporation. The taxpayer and the Income Tax Division differ as

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to the application of the case of *Hartley vs. Pioneer Iron Works,* 181 N. Y. 73, 73 N. E. 576. In that case, it is held that dividends may be declared on treasury shares, to be applied to the purchase price of the shares for the benefit of certain persons who have contracted to buy them. In the case before the Commission, the corporation paid the dividends on its treasury stock. The money was turned over to the fiscal agent
154 and a dividend check was returned to the corporation. These transactions cannot be ignored and under the rule in the *Hartley* case they constitute a declaration in payment of a dividend which should be included in the base upon which the privilege dividend tax is computed.

It is apparent that the Income Tax Division used a wrong rate in this instance, using 2.5651% instead of the tax rate of 2.5%.

Another question the taxpayer raises is the constitutionality of the Wisconsin privilege dividend tax law. The Wisconsin Tax Commission has repeatedly held that it has no right to consider the constitutionality of this law, particularly because of the opinion in *State ex rel. Froedert Grain and Malting Co. vs. Tax Commission of Wisconsin,* 267 N. W. 52, wherein the supreme court held the law constitutional.

FINDINGS.

The Tax Commission, therefore, finds, that the assessment is not constitutionally objectionable,

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and the Commission cannot assume the power of invalidating the taxing statute;

It further finds that the tax should be re-computed at the rate of 2.5%, the assessment further revised to subject to tax the dividends paid upon treasury stock, and the assessment so modified as to rate and revised as to base be confirmed.

DECISION.

IT IS, THEREFORE, THE DECISION OF THE TAX COMMISSION, That a revision of the assessment against the F. W. Woolworth Company, a New York corporation, be made, using the 2.5% tax rate, and that the privilege dividend tax be re-computed to include dividends paid on the treasury stock of said corporation.

IT IS FURTHER ORDERED, That the entire assessment as re-computed be placed on the tax roll, and a proper notice be given to the parties to this appeal of this decision.

Dated at the State Capitol, Madison, Wisconsin, this 19th day of December, 1938.

155 WISCONSIN TAX COMMISSION,
W. J. CONWAY,
HENRY A. GUNDERSON,
HERBERT L. MOUNT,
Commissioners.

156 **Exhibit II—Folded insert.**

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158-159 ANSWER OF WISCONSIN TAX COMMISSION ON APPEAL TO CIRCUIT COURT.

(Title omitted.)

158 For answer to the objections raised by the Appellant in the above-entitled action, the Respondent, appearing by the Attorney General and Harold H. Persons, Assistant Attorney General, say that the assignments of error are without support in the law, or in the facts as shown by the record made up of copies of all the documents, papers, evidence, statements and exhibits on file in the matter and all the testimony taken down, returned into court pursuant to Sec. 71.16, Wisconsin Statutes.

JOHN E. MARTIN,
Attorney General,

HAROLD H. PERSONS,
Assistant Attorney General,
Attorneys for Respondent.

160 *ADMISSION OF SERVICE* of Brief of Appellant on Appeal to Circuit Court.

(Omitted.)

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1-135 **Record Before Wisconsin Tax Commission, Returned to Circuit Court of Appeal.**

1 *RETURN* of Wisconsin Tax Commission on Appeal to Circuit Court.
(Omitted.)

2-6 *INDEX TO PROCEEDINGS* Before Wisconsin Tax Commission.
(Omitted.)

7-33 TRANSCRIPT OF TESTIMONY BEFORE WISCONSIN TAX COMMISSION.

7-9 *COVER OF TRANSCRIPT*, Index to Transcript, Recital of Appearances.
(Omitted.)

10 Mr. Best: If the Commission please, on this appeal of F. W. Woolworth Company—this involves two matters, one, the taxpayer's protest of hearing with respect to an assessment of dividend taxes on dividends declared and paid in 1936 and in 1937, and the other being a request for hearing on a denial of a claim for refund of privilege taxes paid in January of 1936 with respect to a dividend paid on December 2, 1935.

The situation with respect to the use of the percentage of 2.5641 instead of the percentage of 2.5 for the computation of the tax is the same in this matter as it was in the appeal of J. C. Penney Company, and we concede that the tax rate to be applied to that portion of the dividends which is income from Wisconsin property and business should be 2.5 per cent.

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Mr. Ela: And that the computation on that basis will be incorporated in your decision in the matter and made a part of that record in that method.

Mr. Best: Yes.

Mr. Ela: Showing the total amount of tax claimed, is what I want somewhere in this record.

Papers marked Exhibits 1, 2, 3, 4, 5, 6, and 7, AJK.

Mr. Best: We offer in evidence at this time the stipulation of facts between the parties, which the reporter has marked Exhibit 1.

The document which the reporter has marked Exhibit 2 being the privilege dividend tax return of F. W. Woolworth Company with respect to dividends declared October 9, 1935 and paid December 2, 1935, the amount of tax being $2515.61,
11 that being the amount paid and now the amount for which refund is claimed; attached to which is the taxpayer's protest against the payment of the tax.

Mr. Ela: All of which is offered as part of the exhibit.

Mr. Best: Exhibit 2. We offer in evidence a document Exhibit 3, the first sheet of which is a copy of a letter dated February 17th, 1937 from Wisconsin Tax Commission to F. W. Woolworth Company; the next sheet of which is a letter dated February 20, 1937 from F. W. Woolworth Co. to Wisconsin Tax Commission. The next sheet of the Exhibit 3 is a copy of a letter dated March 2, 1937, from Wisconsin Tax Commission

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to F. W. Woolworth Company. The next sheet of the exhibit is a letter dated March 23, 1937 from F. W. Woolworth Company to Wisconsin Tax Commission. The next four sheets of the exhibit are enclosures accompanying the letter dated March 23rd, 1937, the first sheet of the enclosures being the 1934 separate accounting data of F. W. Woolworth Company; the second sheet of the enclosures being the 1935 separate accounting data of the same corporation; the third sheet of the enclosure being the 1936 separate accounting data of that corporation. The fourth sheet of the enclosure being an analysis of surplus account. The next sheet of the exhibit is a copy of letter dated March 31, 1937 from Wisconsin Tax Commission to F. W. Woolworth Company, attached to which is a return receipt for registered mail. The next two sheets of the exhibit are schedules which were enclosures with the letter dated March 31, 1937, showing the computation of the dividend tax and the computation of adjusted total income.

12 The next sheet of the exhibit is a letter dated April 6, 1937 from F. W. Woolworth Company to Wisconsin Tax Commission. The next sheet of the exhibit is a copy of a letter dated April 12, 1937 from Wisconsin Tax Commission to F. W. Woolworth Company, attached to which is a receipt for registered mail. The next sheet of the exhibit is a schedule which accompanied the letter dated April 12, 1937 showing an adjusted computation of privilege dividend tax made by the Tax Commission. The last sheet of the exhibit is a copy of a letter dated July 17th, 1937 from Wisconsin Tax Commission to F. W. Woolworth Com-

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pany attached to which is a return receipt for registered mail.

The report has marked as Exhibit 4 document consisting of four sheets, the first sheet being a telegram from Davies, Auerbach and Cornell to Wisconsin Tax Commission dated July 30, 1937; the second sheet being a copy of a telegram from Wisconsin Tax Commission to Davies, Auerbach and Cornell dated July 30, 1937; the third sheet being a telegram dated August 23rd, 1937 from Davies, Auerbach and Cornell to Wisconsin Tax Commission; and the fourth sheet being a copy of a telegram from Wisconsin Tax Commission to Davies, Auerbach and Cornell, dated August 24th, 1937.

The reporter has marked as Exhibit 5 a document consisting of three sheets, the first one being a copy of a letter dated September 1st, 1937 from Wisconsin Tax Commission to Gilbert, Ela, Heilman and Raeder; the second sheet being a letter dated October 4th, 1937 from Ela, Christianson and Ela to Wisconsin Tax Commission, and the
13 third sheet being a copy of a letter dated October 5, 1937 from Wisconsin Tax Commission to Ela, Christianson & Ela.

Mr. Ela: All of which pertains to an extension of time chiefly, does it not?

Mr. Best: To the right to amend the application for hearing and the receipt of the amended application.

The reporter has marked as Exhibit 6 a copy of a letter dated March 31, 1938, from Wisconsin Tax Commission to F. W. Woolworth Company, attached to which is a return receipt for regis-

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tered mail, that being the letter notifying the taxpayer of the date of this hearing.

And the reporter has marked as Exhibit 7 a document consisting of two sheets, the first sheet being a copy of a letter from the Wisconsin Tax Commission to F. W. Woolworth Company dated April 1, 1938, denying the taxpayer's claim for refund of privilege dividend taxes; the second sheet being the application for hearing on denial of refund filed by F. W. Woolworth Company, undated, but bearing the Wisconsin Tax Commission stamp showing that it was received by the Commission on April 1, 1938.

We offer in evidence Exhibits 1 to 7, inclusive.

Mr. Ela: Well, subject to our examining them —they have been offered here pretty rapidly. I assume they are all right but I would like the privilege of examining them and offering any objections if we find any.

Commissioner Mount: What was Exhibit 1?

Mr. Best: Stipulation of facts.

Mr. Ela: No objection to that because we signed it.

14 Mr. Best: That is all we have just now. We request that the taxpayer's original application for hearing and refund, filed with the Tax Commission August 1, 1937, be marked Exhibit 8.

Mr. Ela: We have no objection.

Commissioner Mount: That is the application for refund?

Mr. Best: Application for refund and hearing. And that the amended application for refund and hearing be marked Exhibit 9, and both of these documents be made a matter of record.

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Commissioner Conway: Let the record show they will be so considered a part of the record.

J. T. LEFTWICH called as witness on behalf of appellant:

Direct Examination.

My name is J. T. Leftwich. I reside in Essex County, New Jersey. I am assistant secretary and assistant treasurer of the F. W. Woolworth Co. and as such I have access to all the books and records of the corporation, and I am as such re-
15 sponsible for the preservation of such books and records. As one of my special duties as assistant secretary I have charge of the taxes for the company. (Exhibit 10 marked for identification.) Exhibit 10 is a tabulation which accurately and truthfully discloses the facts shown thereon. I have shown thereon a tabulation opposite the dividend date so called the total shares except treasury shares, the total number of stockholders, the total dividends paid except on treasury shares, the number of Wisconsin shareholders, the number of shares held by Wisconsin residents, dividends paid to Wisconsin residents and the percentage of dividends paid to Wisconsin residents. Taking for illustration the March 1, 1937 date, which is the date of one dividend, we had total shares except treasury on that date of 9,703,613
16 and there were 51,104 stockholders, and of that total number of stockholders 468 were residents of Wisconsin. The residents of Wisconsin held a total of 13,388 shares of the total of 9,703,613

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shares, and our total dividends paid on that date were $5,822,167.80 and the total amount of dividends paid to Wisconsin residents on account of their ownership of stock on that date was $8032.80, and the percentage of the dividend paid to Wisconsin residents was .1379%, which is less than 1%. All of the percentages in the column of percentages show that less than 1% of the dividends were paid to Wisconsin residents. (Exhibit 10 offered and received in evidence.) With respect to
17 the method and procedure used in the paying of dividends, the dividends are declared by the Board of Directors at meetings held at 233 Broadway, New York, and paid by our transfer agents, City Bank, Farmers Trust Company, 22 William Street, New York. The checks are written by that transfer agent and we issue one check to the transfer agent for the total amount of dividends payable. That transfer agent is a bank in New York City. The dividends are then transmitted to the stockholders by placing the same in the mail in New York City. Our board of directors adopts a form of resolution at the time of declaring the dividend. No act regarding the declaring or paying or transmitting of the dividend is performed within the State of Wisconsin, and there was no
18 such act performed during any of the years 1935, 1936 or 1937. The only possible element that could be involved occurring within the State would be the Wisconsin stockholder receiving through the mail from New York an enclosure with statement of his dividend and the check for the amount of the dividend. We have stores operating in

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Wisconsin and in all of the other states of the Union. The gross receipts from sales from the stores in Wisconsin is handled in the following manner: after the money gets into the till of the local store from gross receipts from sales the local manager pays local bills such as salaries and small supplies that he needs in the store. He deposits the balance above those requirements in a local bank. That bank maintains the money and periodically our Minneapolis office draws on the bank account. The manager has no jurisdiction over the money after it is placed in the bank account and has nothing to do with the transmittal of the money from the local bank. No one in Wisconsin has anything to do with the withdrawal of that money from any Wisconsin bank. This surplus money in the Wisconsin bank is taken to the Minneapolis office where it is combined with money received from banks in various other states under the jurisdiction of the Minneapolis office. No attempt is made to keep the money separate from the different states. The Minneapolis office uses this money in the payment of merchandise bills, alteration, improvements accounts or any other expenditures that they have. From time to time the Minneapolis office accumulates sufficient funds above their requirements, and those are transmitted to the main office in New York, placed in the bank account in New York, from which bank account money is from time to time transferred to the City Bank, Farmers Trust Company, from which the dividends are paid. The general corporation expenses are paid out of the funds in

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New York under the direction of officers who have their offices in New York City and who perform their duties in New York City. This is true of such things as general corporation salaries and taxes. The stock records are kept in New York City with the City Bank, Farmers Trust Company. None of the stock records are kept in Wisconsin. None of the meetings of the Board of Directors of the company have ever been held in the State of Wisconsin. No meetings of stockholders have ever been held in the State of Wisconsin. Stockholders' meetings are held at Watertown, New York. In the payment of dividends we do not make any attempt to earmark any particular source of the money from which the dividends are paid or any particular period during which the moneys were produced which were used
21 for payment of dividends. The dividends are paid out of the general funds of the company. Those general funds are kept on deposit in other banks than the City Bank, Farmers Trust Company. At the time of the dividend we leave with the City Bank, Farmers Trust Company the amount required to pay the dividend. In connection with the claim for refund that has been made on behalf of the company, we did not deduct any part of it from the dividends sent out to stockholders nor have we ever recovered any part of it from them or asked them to refund it to us, so that at the present time it is a claim of the Woolworth Co. The determination of the amount of dividends that each stockholder is to receive is

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made by resolution. The City Bank, Farmers
22 Trust Company after the amount of dividend is fixed, make up a tabulation according to their stock records with reference to what each stockholder is to receive. They are compensated by Woolworth Co. for their services and if they were required to make additional and further deductions or computations in order to deduct the amount of tax from each dividend sent out to stockholders, no matter where they lived, there would be additional expense to our company. Our company has filed income tax returns within the State of Wisconsin as required, and to the best of our ability we have disclosed the true facts regarding our income and all of it and have concealed nothing. We have filed a dividend tax report on the items now claimed by the State of Wisconsin but did not pay the taxes that are claimed because we are challenging the validity of the statutes, and in that report we have dis-
23 closed the true and correct facts so far as we know.

Cross Examination of J. T. Leftwich.

F. W. Woolworth Co. is licensed to do business in Wisconsin and filed income tax returns for each of the years 1934, 1935 and 1936. The Wisconsin income tax computed on those returns is by separate accounting, that is, the expenses in connection with each store after the deduction of the cost
24 of the merchandise was accounted for, was apportioned to all the stores and the expenses appor-

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tioned to the Wisconsin stores were deducted from the Wisconsin income. In those general expenses were office expenses including office expense of the New York office, including expenses for transfer fees and also the allocation of the federal income taxes which were paid from New York. The merchandise purchasers were paid from Minneapolis. The general officers' salaries and the expenses of the New York office were paid from New York out of funds in New York banks. In each of the years 1934 to 1936, inclusive, F. W. Woolworth Co. reported a net income to Wisconsin in
25 excess of $25,000.00. The gross sales in Wisconsin by the stores located in this state during those years was something in excess of $6,000,000.00 in each of the years. Referring to Exhibit 10, the heading of the second column on that exhibit is total shares except treasury. The heading of the fourth column is total dividends paid except on treasury shares. The third sheet of Exhibit 3, being a letter from F. W. Woolworth Co. to Wisconsin Tax Commission dated March 23, 1937, signed by me, shows that the total amount of dividends agree with the total amount shown on Exhibit 10. It reflects that the amount for each dividend date was $5,822,167.80. There is nothing said in Exhibit 3 that those dividends are excluding
26 dividends on treasury stock. Dividends on treasury stock come back to the company but not as income. It is used as a surplus item on the company's books but there is in fact enough money transferred to our transfer agents to de-

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clare dividends on the shares of stock including treasury stock, and we receive back from the transfer agent a dividend check with respect to the treasury stock. I will supply to the Commission by letter the number of treasury shares as of each of these dividends dates and the amount of the check which was received from the transfer agent with respect to the dividends on these treasury shares. In 1934, 1935 and 1936 F. W. Woolworth Co. had in the neighborhood of 55 stores
27 in Wisconsin. Each of those stores had a bank balance.

28 Exhibit 11 is a schedule showing the cash in banks in the State of Wisconsin at the end of the years 1934, 1935 and 1936 and was prepared under my supervision from the books of the company (Exhibit 11 offered in evidence). The organization maintained in Minneapolis by the company is what we call a district office. They have complete supervision of a certain number of stores. Our Minneapolis office takes in Minnesota, part of North Dakota, Iowa, part of Nebraska, part of Michigan, and Wisconsin, and the men travel from there to stores in Wisconsin to supervise the activities and audit the books of the company. There is probably a staff of one hundred at the Minneapolis office and they supervise about 150 to 165 stores. No work is done in Wisconsin from the Minneapolis office except that the traveling auditor makes his visits here and supervises
29 the stores and makes reports on them to his chief in Minneapolis. We call our auditor the superin-

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tendent and he does exercise some supervision over the management and over the purchases of merchandise of the Wisconsin stores. He is formerly a store manager and knows the operation of the store thoroughly and also makes the audits of the accounts. In addition to the traveling auditor other Minneapolis employes visit the Wisconsin stores, such as the District Manager and Assistant District Manager and what we call the merchandise men make periodical visits to Wisconsin. The Minneapolis office determines what merchandise the Wisconsin store shall buy and in what quantities. The orders go through the Minneapolis office for merchandise before it is placed with the manufacturer. The order for merchandise shows the quantity on hand and the quantity last ordered and the history of the items, and the merchandise man who is a trained man can tell from the size of the store whether the
30 order is excessive. The store manager can not determine to sell any new item of merchandise in Wisconsin stores. If a new line of goods is to be sold the Minneapolis office assigns them to the Wisconsin stores. We have representative stores in which we place new items until they are tried, and if they are proven then the size of the store depends upon the quantity that is assigned to each. The Minneapolis office supervises the layout of the store and the place in which different types of merchandise are to be displayed. The Minneapolis office in turn is supervised by the New York office. The nature of that supervision is that the executive office has what we call a rep-

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resentative and he visits the district office and
31 also a representative number of stores. He is a New York man and he may visit stores in Wisconsin from time to time. The Minneapolis office makes the leasing arrangements. The individual store records are kept in Minneapolis. I have stated that funds from the different stores are sent from Wisconsin to Minneapolis. We have ten other transfer offices in the United States besides the one at Minneapolis. We never maintained one in Wisconsin nor in Michigan. We have one in Chicago, Illinois. The stores in Wisconsin were under the jurisdiction of our Chicago office prior to 1918, at which time our Min-
32 neapolis office was opened. We keep a separate set of books for each store in Wisconsin in our Minneapolis office and the returns have been based upon information shown in those records.

"Mr. Best: One thing more, I think the record ought to show the original and amended applications for hearing in this matter contain some objections to the method of computation which the Commission used, and as I understand it those objections have been withdrawn with the exception of the percentage higher than 2 1/2.

"Mr. Ela: I understand that is true."

35 *LETTER* from Attorneys for Appellant, Withdrawing Objections to Certain Exhibits.

(Omitted.)

39-45 *DECISION* of Wisconsin Tax Commission (the Decision of the Wisconsin Tax Commission is At-

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tached as an Exhibit to the Notice of Appeal—R. 152-153, C. 22-25, and is Consequently Omitted at This Portion of the Case).

46-47 *LETTER* of Wisconsin Tax Commission and Return Receipt to Appellant, Dated December 22, 1938, Enclosing Decision and Assessment of Additional Tax.

(Omitted.)

48-49 *RECOMPUTATION* of Privilege Dividend Tax Enclosed in Letter of Wisconsin Tax Commission of December 22, 1938, Giving Effect to Decision of Tax Commission (this is Attached as an Exhibit to Notice of Appeal—R. 156, C. 66).

50-53 *EXHIBIT 1,* Partial Stipulation of Facts on Application for Hearing on Objections to Assessment and on Objections to Order Disallowing Claim for Refund.

(Title omitted.)

50 *WHEREAS,* the above entitled matter is pending before the Wisconsin Tax Commission upon the amended application of F. W. Woolworth Co., a New York corporation, for hearing on objections to assessment dated July 17th, 1937, and on order of the Wisconsin Tax Commission denying the claim for refund of said F. W. Woolworth Co. on account of tax paid in the amount of $2515.61 on January 29th, 1936, and

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WHEREAS, it appears that certain of the facts in connection with the matters set forth in the amended application for hearing and objections are not in dispute and that certain facts can be stipulated which will result in simplifying the proofs to be offered at the time of hearing in the above captioned matter,

NOW, THEREFORE, IT IS HEREBY STIPULATED between the Wisconsin Tax Commission and F. W. Woolworth Co., by their respective attorneys as follows:

51 1. That on the 17th day of July, 1937, the said F. W. Woolworth Co. received notice of additional assessment of privilege dividend tax in the principal amount of $17,959.19 together with interest and penalties thereon; that on or about January 29th, 1936 the said F. W. Woolworth Co. paid to the Wisconsin Tax Commission the sum of $2,515.61 on account of dividend paid by it on December 2nd, 1935, and that thereafter application for refund of said tax was made, and that said application for refund was denied by the Wisconsin Tax Commission, that the application for hearing on account of the additional assessment above referred to and the application for hearing on order disallowing the refund above referred to, have been duly filed with the Wisconsin Tax Commission within the time provided by law.

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2. That the F. W. Woolworth Co. is a New York corporation which conducts, and at all times mentioned in the application did conduct, a retail mercantile business in twenty-nine states of the United States (including Wisconsin), the District of Columbia and Cuba; that the company also owns all or part of the stock of corporations engaged in a similar business in the other nineteen states of the United States, Canada, Great Britain and Germany; that the statutory principal office of the company at which meetings of stockholders are held is at the Woolworth Building, Watertown, New York; that the principal business office at which meetings of directors are held is at the Woolworth Building, New York, New York.

3. That all meetings of the board of directors of the company at which dividends are declared are held in the State of New York; that all acts of the company or its agents in connection with the declaration and payment of such dividends are performed within and pursuant to the laws of the State of New York, and that the funds out of which such dividends are paid are kept in the
52 State of New York.

4. It is expressly stipulated and agreed that the facts herein set forth shall be accepted as proven, and that additional and supplementary proofs may be made at the time set for hearing

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on the application for hearing hereinbefore referred to.

Dated, April 6, 1938.

WISCONSIN TAX COMMISSION,
By JOHN S. BERK,
Its Attorney,

F. W. WOOLWORTH CO.,
By ELA, CHRISTIANSON & ELA,
Its Attorneys.

54-57 *EXHIBIT 2,* Return of F. W. Woodworth Co., dated January 24, 1936, Reflecting Dividend Paid on December 2, 1935, and Letter Accompanying Return Showing Payment Made Under Protest.

(Copy of return omitted.)

55 F. W. WOOLWORTH CO.,

233 Broadway, New York, N. Y.

Privilege Dividend Tax Return, Jan. 31, 1936.

To the Wisconsin Tax Commission:

F. W. Woolworth Co., a New York corporation, doing business as a foreign corporation in the State of Wisconsin, having its principal office at Watertown, Jefferson County, New York, and its principal office in Wisconsin at 1-5 East Main Street, Madison, hereby files under protest the Privilege Dividend Tax Return and hereby pays under protest the sum of $2515.61 which are required to be filed and paid, respectively,

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under the alleged authority of Section 3 of Chapter 505 of the Laws of 1935 as amended by Chapter 552 of the Laws of 1935.

1. Protest is made against the requirement of such return and the exaction of such tax and each and every part thereof, on the ground that such tax is invalid and contrary to the rights of F. W. Woolworth Co. under the Constitution and Laws of the State of Wisconsin and the Constitution and Laws of the United States.

2. Without prejudice to the rights of the Company on the foregoing grounds, protest is made against the exaction of such tax and each and every part thereof, on the ground that it is imposed upon the privilege of declaring dividends, which privilege, in respect of F. W. Woolworth Co., which is a foreign corporation whose dividends are declared in the State of New York, is not within the jurisdiction of the State of Wisconsin to tax, either under the provisions of Artcle VIII, Section 1, or any other section of the Wisconsin Constitution, or under the provisions of the Constitution of the United States.

3. Without prejudice to the rights of the Company on the foregoing grounds, protest is made against the exaction of that part of the tax which is imposed upon the privilege of persons not residents or citizens of the State of Wisconsin to receive dividends, on the ground that it is not within the jurisdiction of the State

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of Wisconsin to tax, either under the provisions of Article VIII, Section 1, or any other section of the Wisconsin Constitution or under the pro-
56 visions of the Constitution of the United States, since such dividends are received as well as paid outside the State of Wisconsin, and on the ground that the said tax is in effect a personal income tax upon non-resident stockholders not subject to the taxing jurisdiction of the State of Wisconsin, the imposition of which deprives such stockholders of their property without due process of law in violation of the provisions of the Constitution and Laws of the State of Wisconsin and of the United States.

Payment of the tax is made solely under compulsion and to avoid the penalties provided by said Act and by the Laws of the State of Wisconsin.

Dated January 24, 1936.

F. W. WOOLWORTH CO.
By A. L. Cornwell
Vice-President.

Attest:

PAUL HOFER, Jr.,
Secretary.

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58-75 *EXHIBIT 3,* Various Letters re Information Requested by Wisconsin Tax Commission.

58 *REQUEST FOR INFORMATION* by Wisconsin Tax Commission to Appellant Dated February 17, 1937.

(Omitted.)

59 REQUEST Dated February 20, 1937, by Appellant for Additional Time Within Which to Furnish Information.

(Omitted.)

60 *LETTER* of Wisconsin Tax Commission Dated March 2, 1937, Granting Additional Time for Furnishing Information.

(Omitted.)

61-66 *LETTER* from Appellant, Dated March 23, 1937, to Wisconsin Tax Commission, in Response to Request for Information and Also Enclosing Schedule with Respect to Operations for the Years 1834, 1935 and 1936.

(Omitted.)

67-69 *LETTER* of Wisconsin Tax Commission to Appellant, Dated March 31, 1937, Enclosing Schedule Showing Computation of Claimed Tax on Dividends Declared and Paid Between September 26, 1935 and March 1, 1937.

(Omitted.)

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70 *LETTER* from Appellant to Wisconsin Tax Commission, Dated April 6, 1937, Acknowledging Receipt of Letter of March 31, 1937, with Reference to Errors in Computation.

(Omitted.)

71-73 *LETTER* Dated April 12, 1937, from Wisconsin Tax Commission to Appellant, and Registered Return Receipt, Enclosing Computation of Alleged Tax on Dividends from December 2, 1935 to March 1, 1937.

(Registered receipt omitted.)

72 April 12, 1937.

F. W. Woolworth Co.,
233 Broadway,
New York, N. Y.

Attention: Mr. J. T. Leftwich,
Assistant Secretary-Treasurer.

Re: 99-9435.

Gentlemen:

In accordance with information submitted in your letter of April 6, we are submitting herewith a corrected schedule showing our computation of Wisconsin privilege dividend tax due upon dividends paid by your corporation from December 2, 1935, to March 1, 1937.

Payment of the additional tax shown on this schedule should be made prior to April 30, 1937,

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in order to prevent the accumulation of further interest.

Very truly yours,

WISCONSIN TAX COMMISSION
Income Tax Division
By:

Auditor

LFD:McC
Enc.

Registered Mail
Return Receipt Requested

73 **Folded insert.**

74-76 *LETTER* of July 17, 1937, of Wisconsin Tax Commission to Appellant, Assessing Additional Privilege Dividend Tax, and Return Receipt.

(Return receipt omitted.)

75 July 17, 1937.

F. W. Woolworth Company,
C/o Mr. Paul Hofer, Jr., Sec'y.,
Woolworth Building,
New York, N. Y.

In Re: 99-9435

Gentlemen:

Chapter 233, Laws of 1937, effective June 15, 1937, adds a new sub-section to the privilege dividend tax law, making applicable to that tax the provisions of the normal income tax law with

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regard to additional assessments, review of assessments, refunds, credits, and collections.

Pursuant to the privilege dividend tax law as thus amended, you are hereby notified of an additional assessment of privilege dividend tax in the principal amount of $17,959.19. The computation of this tax was explained in our letter of April 12, 1937, which also showed the amount of penalty and interest to April 30, 1937. In addition to the amounts set forth in that letter the principal amount of the tax is subject to interest at the rate of one-half of one per cent per month from April 30, 1937, until paid.

If you desire a hearing in this matter, it will be necessary for you to apply therefor in writing stating definitely and in detail your objections to the assessment. Such application must be filed in duplicate within twenty days from the receipt of this notice.

If a hearing is applied for, you may, under Section 71.10 (6) (a) of the Statutes, elect to deposit with the State Treasurer the total amount of the additional taxes set forth above together with interest thereon to the first day of the month succeeding the application for hearing. Your election to so deposit these taxes must be expressed in your application for hearing.

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If no request for hearing is made within the time specified above, this assessment will become final and conclusive.

Yours very truly,

WISCONSIN TAX COMMISSION
Income Tax Division

By: R. F. Kamm, Auditor

RFK:W
Registered Mail
Return Receipt Requested

71-81 *EXHIBIT 4,* Telegrams Requesting and Granting Extensions for Filing of Application for Hearing.

(Omitted.)

82-85 *EXHIBIT 5,* Letters re Amending Application for Hearing on Assessment and Claim for Refund.

(Omitted.)

86-88 *EXHIBIT 6,* Letter from Wisconsin Tax Commission to Appellant, Dated March 31, 1938, and return receipt, Fixing Time for Hearing.

(Omitted.)

89 *EXHIBIT 7,* Denial of Claim for Refund of Privilege Dividend Tax.

(Omitted.)

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90-91 *EXHIBIT 7,* Application for Hearing on Denial of Refund.

(Title omitted.)

90

APPLICATION FOR HEARING ON DENIAL OF REFUND.

The F. W. Woolworth Co., feeling aggrieved by the order of the Wisconsin Tax Commission, dated April 1st, 1938, disallowing its claim for refund of tax paid in the amount of $2515.61 on January 29th, 1936, on account of dividend paid December 2nd, 1935, hereby applies for a hearing before the Wisconsin Tax Commission on the order disallowing such claim, for the reasons set forth in the amended application for hearing filed by the F. W. Woolworth Co. before the Wisconsin Tax Commission on October 4th, 1937 in connection with its application for hearing on an additional assessment and for refund with respect to privilege dividend taxes assessed by the Wisconsin Tax Commission.

F. W. WOOLWORTH CO.
By Ela, Christianson & Ela
Its Attorneys

92-112 *EXHIBIT 8,* Original Application to Wisconsin Tax Commission for Hearing and Refund.

(Omitted.)

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113-132 *EXHIBIT 9,* Amended Application for Hearing and Refund.

(Caption and verification omitted.)

113 AMENDED APPLICATION FOR HEARING AND REFUND PURSUANT TO LAWS OF 1937, CHAPTER 233 AND WISCONSIN STATUTES, SECTIONS 71.12 AND 71.17.

F. W. Woolworth Co., a New York corporation duly authorized to transact business as a foreign corporation in Wisconsin, hereby files objections to an additional assessment of Privilege Dividend Taxes in the principal amount of $17,959.17, in respect of dividends paid by the Company between December 2, 1935, and March 1, 1937, both inclusive, by notice dated July 17, 1937, and pursuant to audit report dated April 12, 1937. In accordance with the Statutes of the State of Wisconsin and particularly Chapter 233 of the Laws of 1937 and Wisconsin Statutes Section 71.12, hereby applies for a hearing and further hereby applies for a refund of tax paid in the amount of $2515.61 on January 29, 1936, on account of dividend paid December 2, 1935, together with interest thereon at 6%.

114 The period prescribed by law within which this application may be filed has been duly extended by the Tax Commission to August 31st, 1937.

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The objections to said assessment and the facts in support of such objections and in support of the claim for refund are as follows:

First: F. W. Woolworth Co., is a New corporation which conducts, and at all times hereinafter mentioned did conduct, a retail mercantile business in twenty-nine states of the United States (including Wisconsin), the District of Columbia and Cuba. The Company also owns all or part of the stock of corporations engaged in a similar business in the other nineteen states of the United States, Canada, Great Britain and Germany. The statutory principal office of the Company at which meetings of stockholders are held is at Woolworth Building, Watertown, New York. The principal business office at which meetings of directors are held is at Woolworth Building, New York, New York.

Second: On each of the dates fixed as a record date for the determination of stockholders entitled to receive each of the dividends upon which a Privilege Dividend Tax has been assessed against the Company there have been in excess of fifty thousand stockholders of the Company residing in all parts of the world holding an aggregate of 9,703,613 shares (exclusive of treasury stock.) On each of said dates the
115 number of such stockholders residing in the State of Wisconsin has been not greater than 470, and the number of shares held by such stockholders has been not greater than 14,597. The number of shares held by and the amount of divi-

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dends paid to all stockholders and stockholders resident in Wisconsin on each of said dates is shown in Table A attached hereto and made a part hereof.

Third: All meetings of the Board of Directors of the Company at which dividends are declared are held in the State of New York; all acts of the Company or its agents in connection with the declaration and payment of such dividends are performed within and pursuant to the laws of the State of New York; and the funds out of which such dividends are paid are kept in the State of New York. No act or transaction connected with the declaration and payment of such dividends is done within the State of Wisconsin with the sole exception that certain dividends so declared and paid, amounting, in case of each of the dividends mentioned in Table A, to less than one-sixth of one per cent. of all the dividends declared and paid, are received by stockholders of the Company residing in the State of Wisconsin. The percentage, received by residents of Wisconsin, of the total of each of such dividends is set forth in Table A.

Fourth: The process by which income earned in Wisconsin finally reaches stockholders of the Company is as follows:

116 All the gross income of the Company's stores in Wisconsin, after payment of certain expenses, is sent to a district office outside of the State, where such income is mingled with funds received from stores in other states. After the payment

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by the district office of certain other expenses, all surplus funds are transferred by that office to the principal office of the Company in New York and deposited in a New York bank to the credit of the Company. Out of the sums so deposited are paid general corporation expenses, salaries, taxes, dividends and many other items. All stock records are kept and all dividends are disbursed by City Bank Farmers Trust Company, of New York, which acts as transfer agent and paying agent of the Company. Dividends are not paid out of income received from any particular source or earned in any ascertainable period, but are paid out of the general funds of the Company. The dividend payment is made by drawing a check or checks for the total amount to the order of City Bank Farmers Trust Company, which, itself, makes the actual payments to stockholders.

Fifth: By reason of the facts above stated the transactions upon which the Privilege Dividend Tax is attempted to be imposed in respect of F. W. Woolworth Co., are wholly outside of the jurisdiction of the State of Wisconsin, with the exception of the transfer of dividends by the Company to certain of its stockholders residing within the State of Wisconsin in which case the
117 Transaction takes place partly with and partly outside of the jurisdiction of said State. To the extent that the Privilege Dividend Tax is attempted to be imposed upon transactions wholly outside of the jurisdiction of the State, it is unconstitutional and void and in violation of the

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rights of F. W. Woolworth Co. and of its stockholders residing outside of the State, under the Constitution of the United States, in that it deprives them of liberty and/or property without due process of law.

Sixth: Without prejudice to the statements in Paragraph "Fifth" hereof, the aforesaid Privilege Dividend Tax Law is unconstitutional and void and in violation of the rights of F. W. Woolworth Co., and of its stockholders who reside outside of the State of Wisconsin under the Constitution of the United States in that it deprives them of liberty and/or property without due process of law, because it imposes upon such non-resident stockholders what is in effect a tax upon income of such stockholders, although such income is not earned within the State of Wisconsin nor derived from property or business conducted within such State, and in that it imposes upon F. W. Woolworth Co. a duty of paying and withholding from such stockholders an unconstitutional tax which requires the expenditure of time and money on the part of the Company to compute, pay, and withhold such tax. Although the privilege Dividend Tax Law makes the stock-
118 holders ultimately liable for the amount of the tax the Company, nevertheless, has legal standing to object to the validity of the law for the reason that if the aforesaid Privilege Dividend Tax Law is unconstitutional the Company is being subjected to an unconstitutional burden, and further because in practice it is impossible to with-

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hold the exact amount of the tax from each stockholder, and it therefore becomes necessary for the Company to pay a part of the tax out of its general funds.

Seventh: Without prejudice to the statements in Paragraphs "Fifth" and "Sixth" hereof, the aforesaid Privilege Dividend Tax Law is unconstitutional and void and in violation of the rights of F. W. Woolworth Co. and of its stockholders under the Constitution of the United States, in that it deprives them of property without due process of law by imposing a tax on the privilege of receiving and paying out dividends, which privilege is not granted by and could not constitutionally be denied by the State of Wisconsin, such privilege being granted by the State of New York and exercised pursuant to the laws of said State.

Eighth: Without prejudice to the statements in Paragraphs "Fifth", "Sixth" and "Seventh" hereof, the Privilege Dividend Tax is unconstitutional and void insofar as it imposes a tax upon dividends which are paid by the Company to stockholders residing outside of Wisconsin because it is, in effect, a tax upon the stock held by such stockholders, or upon the dividend which is a debt of the Company when declared, which are outside of the jurisdiction of the State and such tax, therefore, deprives F. W. Woolworth
119 Co. and its stockholders, residing outside the State of Wisconsin, of liberty and/or property without due process of law in violation of the

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provisions of the Constitution of the United States.

Ninth: Without prejudice to the statements in Paragraphs "Fifth", "Sixth" and "Seventh" hereof, the aforesaid Privilege Dividend Tax Law is wholly void for the reason that it is unconstitutional as applied to dividends paid to stockholders of the Company residing outside of Wisconsin and to restrict the application of the law to dividends paid by Wisconsin corporations or dividends paid by foreign corporations to stockholders residing in Wisconsin would be a denial of the equal protection of the law to such corporations and such stockholders and a violation of the Constitution of the United States and the Constitution of Wisconsin. Further, to so restrict the application of the law would be to impose a tax which the legislature of Wisconsin did not intend to impose, since, notwithstanding the provisions of Laws of 1935, Chapter 505, Section 4, it is clear that the provisions of the act are based upon a plan to impose a tax which will fall equally upon resident and non-resident stockholders of corporations doing business in Wisconsin and that to so restrict the act would be to defeat the obvious intention of the legislature.

Tenth: Without prejudice to the statements in Paragraphs "Fifth", "Sixth", "Seventh", "Eighth" and "Ninth" hereof, the aforesaid Privilege Dividend Tax Law is unconstitutional
120 and void under Article I, Section 10 of the Constitution of the United States and Article I,

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Section 12 of the Wisconsin Constitution because it impairs the obligation of the contract between the stockholders and the Company under the corporate charter and under the dividend resolutions by which the stockholders received a right to dividends.

Eleventh: The Company has not withheld from dividends paid to its stockholders any part of the dividend tax as required by Laws of 1935, Chapter 505, Section 3, subdivisions (1) and (3). In so failing to deduct such taxes the Company did not intend to admit that it was liable therefor, or to assume any existing liability of its stockholders to pay the tax, but it failed to withhold the tax because it believed that said law was unconstitutional and void and that if the tax was collected from stockholders the Company would be put to trouble and expense to refund to them amounts so withheld from them, and further that the Company would be violating the constitutional rights of its stockholders if it acted as agent of the State to collect a tax levied under an unconstitutional law and that it would be violating the contract rights of its stockholders if it did not pay to them the full amount of the dividend declared by its Board of Directors, deducting therefrom only the amounts of valid taxes which the Company would be constitutionally required to deduct and withhold.

Twelve: The Company claims that the computation by the Tax Commission of the Privilege Dividend Tax alleged to be due as shown in

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Table D and Table E attached hereto is erroneous, even assuming that the aforesaid Privilege
121 Dividend Tax Law is entirely valid and constitutional. The computation which the Company claims is correct, if it be finally determined that the law is entirely valid, is set forth in Table C, which is attached hereto and made a part hereof. The reasons why the Company claims that the computations in Tables D and E are incorrect and the computation in Table C is correct are:

1. The net income of the Company for the years 1934, 1935 and 1936 respectively was $32,142,362.76 for 1934, $31,247,299.83 for 1935 and $32,624,988.45 for 1936; that the dividends paid by the Company in 1935, 1936 and 1937 if they were paid at all out of net income for the previous calendar or fiscal year, were paid out of the income as stated above and as stated at line 3 in Table C and were not paid out of adjusted net income as shown in Table E. The net income of the Company out of which dividends are paid is the entire net income as shown in the books of the Company and is not the adjusted net income which may be used for Federal or State income tax purposes. In determining whether a dividend may lawfully be paid, reference is made solely to the net income and surplus or undivided profits on the books of the Company and not the taxable net income as stated in any Federal or State income tax return. The adjustments which have been made in book income in Table E. are part of the adjustments

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which were made by the Company to reconcile its statement of Federal taxable income with the changes in its surplus as shown by its books.

122 These adjustments were made because of provisions in the Federal income tax law allowing or disallowing certain types of deductions for tax purposes. The Company knows no reason why such adjustments should be made in determining the income out of which dividends are paid and claims that the only proper figures to use are those stated in line 3 in Table C.

2. The rate of tax prescribed by the Privilege Dividend Tax Law is 2.5%. The tax has been assessed upon the Company at the rate of 2.5641%. The reason for the increase in rate is stated to be that inasmuch as the tax is not deducted from the dividends paid to stockholders, the amount of the tax in itself constitutes a further dividend which is also subject to tax and that the tax rate should therefore be adjusted to the rate of 2.5641% in accordance with the second formula shown in the "Note" to Table B. The Company claims, however, that to apply this adjusted rate is in effect to levy a tax upon the entire tax instead of upon that part of the tax which is derived from income from sources within the State of Wisconsin, and that the correct rate will take into account the additional factor of the ratio which the Wisconsin net income bears to the total net income of the Company. The formula which the Company claims is correct for computing the adjusted rate is set forth in the "Note" to Table B.

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Thirteenth: For the reasons above stated F. W. Woolworth Co. claims that because the Privilege Dividend Tax is entirely unconstitutional and void, no tax is due thereunder and that the tax heretofore paid under protest on
123 January 29, 1936 in the amount of $2515.61 was not lawfully due to the State of Wisconsin and the Company, therefore, requests that the assessment hereinabove referred to be vacated and cancelled and that the Tax Commission certify a refund to F. W. Woolworth Co. in the amount of $2515.61 with interest at the rate of 6% per annum from January 31, 1936 to the date upon which the refund shall be paid.

Fourteenth: In the alternative and in the event that it shall be finally determined that the Privilege Dividend Tax Law is unconstitutional and void only as applied to dividends paid to stockholders of foreign corporations residing outside the State of Wisconsin, the Company requests that the assessment hereinabove referred to be reduced to the total of the amounts stated in line 8 of Table B, which is attached hereto and made a part hereof, with lawful interest thereon and that the Tax Commission certify a refund to F. W. Woolworth Co. in the amount of $2515.61 with interest at the rate of 6% per annum from January 31, 1936 to the date upon which the refund shall be paid, minus the amount of such assessment as reduced.

Fifteenth: In the alternative and in the event that it shall be finally determined that the Privilege Dividend Tax Law is entirely valid and

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constitutional, the Company requests that the assessment hereinabove referred to be reduced to the total of the amounts stated in line 10 of
124 Table C, which is attached hereto and made a part hereof, with lawful interest thereon.

Sixteenth: Any statements of claims or objections herein which are inconsistent are intended to be in the alternative and by making such alternative claims and objections the Company does not intend to waive its claim that the Privilege Dividend Tax Law is entirely void and unconstitutional and that no tax is due from the Company, but that on the other hand the Company is entitled to a refund of the entire amount of the tax heretofore paid with interest thereon.

Dated: New York, September 10th, 1937.

F. W. WOOLWORTH CO.
By A. L. Cornwell,
Vice-President.

PAUL COSTELLO,
Notary Public, Queens County
Certificate Filed in
New York County Clerk's No. 26
New York County Register's No. 8-C-17
Kings County Clerk's No. 103
Kings County Register's No. 6018
Commission Expires March 30, 1938

DAVIES, AUERBACH & CORNELL,
One Wall Street,
New York, New York.

GILBERT ELA, HEILMAN & RAEDER,
One West Main Street,
Madison, Wisconsin.
Attorneys for Applicant.

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126 **Table A—Folded insert.**

127-128 **Table B—Folded insert.**

129 **Table C—Folded insert.**

130 **Table D—Folded insert.**

131 **Table E—Folded insert.**

133 **Exhibit 10—Folded insert.**

135 **Exhibit 11—Folded insert.**

136 *ADMISSION OF SERVICE* of Notice of Appeal to Circuit Court by Wisconsin Tax Commission.
(Omitted.)

137-157 *NOTICE OF APPEAL* to Wisconsin Tax Commission.
(Included at C. 22-26.)

158-159 *ANSWER* of Wisconsin Tax Commission.
(Included at C. 27.)

160 *ADMISSION OF SERVICE* of Appellant's Brief by Wisconsin Tax Commission.
(Omitted.)

161-195 *APPELLANT'S BRIEF* in Circuit Court.
(Omitted.)

196-236 *RESPONDENT'S BRIEF* in Circuit Court.
(Omitted.)

237 *STIPULATION* with Respect to Hearing in Circuit Court.
(Omitted.)

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238-239 *DECISION AND ORDER* Confirming Assessment and Confirming Order Denying Claim for Refund and Directing Judgment.

(Caption omitted.)

238 The above entitled matter comes before this Court upon appeal taken by F. W. Woolworth Co., a foreign corporation, from the decision and order of the Wisconsin Tax Commission dated December 19th, 1938.

Briefs were filed by Davies, Auerbach, Cornell & Hardy of New York City, and Ela, Christianson & Ela of Madison, Wisconsin, representing the F. W. Woolworth Co., appellant, and by the Attorney General of the State of Wisconsin and H. H. Persons, Esq., Assistant Attorney General, representing the respondent.

The court has considered the issues and matters raised on this appeal and which are covered in briefs filed by the respective parties, and particularly the constitutional question raised by the appellant; in view of the decision of the Supreme Court of the State of Wisconsin in the case of *State of Wis. ex. rel., Froedert Grain & Malting Co., Inc., vs. Wisconsin Tax Commission*, 221 Wis. 225, and particularly in view of the decision rendered on the motion for rehearing in that case, this Court feels that it has no alternative except to hold the law under which the assessments were levied constitutional; and accordingly the said order of the Wisconsin Tax Commission affirming the assessment or assessments involved in this appeal should be confirmed, and further

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that the order denying taxpayer's claim for refund in respect to taxes paid on account of dividends paid December 2nd, 1935, must also be affirmed. The other issues presented upon the
239 appeal are also decided in favor of the Wisconsin Tax Commission.

IT IS, THEREFRE, ORDERED, that the assessment on this appeal by the Wisconsin Tax Commission against F. W. Woolworth Co., a foreign corporation, be and the same is hereby confirmed, and that judgment confirming said assessment be entered herein, and that further the order of the Wisconsin Tax Commission dated Dec. 19th, 1938, denying the claim of the F. W. Woolworth Co. for refund in respect to taxes paid on account of dividends paid on December 2nd, 1935, be and the same is hereby affirmed and that judgment affirming said order be entered herein.

AUGUST C. HOPPMANN,
Circuit Judge.

Dated, June 10, 1939.

240 *WAIVER* or Notice of Appellant to Application for Entry of Judgment.

(Omitted.)

241-242 JUDGMENT OF CIRCUIT COURT.

(Caption omitted.)

241 At the regular March 1939 term of the Circuit Court, begun and held in the Court House in

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the City of Madison in said county, and on the 10 day of June, 1939 of said term. Present the Hon. August C. Hoppmann, Circuit Judge presiding.

The above entitled proceeding was brought to review an order of the Wisconsin Tax Commission dated December 19th, 1938, which said order of the Wisconsin Tax Commission affirmed the assessments and the tax imposed upon dividends declared by the F. W. Woolworth Co., a foreign corporation, being dividends of December 2nd, 1935, March 2nd, 1936, June 1st, 1936, September 1st, 1936, December 1st, 1936 and March 1st, 1937, and which said order further denied the claim of F. W. Woolworth Co. for refund in respect to taxes paid on account of dividends paid December 2nd, 1935; the matter coming on to be heard at said term under the provisions of the Wisconsin Statutes, and particularly Sec. 71.16 thereof, the appellant appearing by Davies, Auerbach, Cornell & Hardy of New York City, and Ela, Christianson & Ela of Madison, Wisconsin, its attorneys, and the respondent appearing by the Attorney General and Harold H. Persons, Esq., Assistant Attorney General of the State of Wisconsin, and the Court having on this 10 day of June, 1939 filed its decision confirming said order and said assessment and tax and affirming the order of the Wisconsin Tax Commission denying the claim for refund of F. W. Woolworth Co. on account of tax paid on dividends declared

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242 December 2nd, 1935, and directing that judgment be entered in accordance therewith, and notice as provided by Sec. 71.16 (8), Wisconsin Statutes, of application for the entry hereof having been duly waived in writing by the attorneys for the appellant, F. W. Woolworth Co., a foreign corporation.

Now, therefore, upon the record, files and proceedings in the above entitled appeal and on motion of the attorneys for the Wisconsin Tax Commission,

IT IS ADJUDGED that said order of the Wisconsin Tax Commission dated December 19th, 1938 and the said assessment and tax imposed thereby and the denial thereof of appellant's claim for refund, be and the same are in all respects confirmed without costs to either party, except that the appellant F. W. Woolworth Co. shall pay the clerk's fee.

By the Court,

AUGUST C. HOPPMANN,
Judge.

243-246 *NOTICE OF APPEAL* to Supreme Court.

(Omitted.)

246 *UNDERTAKING* on Appeal to Supreme Court.

(Omitted.)

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247 *POWER OF ATTORNEY* to Execute Undertaking on Appeal.

(Omitted.)

248 *RETURN* of Circuit Court to Supreme Court on Appeal.

(Omitted.)

Respectfully submitted,

DAVIES, AUERBACH, CORNELL & HARDY,
1 Wall Street, New York.

ELA, CHRISTIANSON & ELA,
Madison, Wisconsin,
Attorneys for Appellant.

Pleas before the Supreme Court of the State of Wisconsin at a term thereof begun and held at the Capitol in Madison, the seat of government of said State on the Second Tuesday, to-wit: the Eighth day of August, A. D. 1939.

Present: Hon. Marvin B. Rosenberry, Chief Justice, Hon. Chester A. Fowler, Hon. Oscar M. Fritz, Hon. Edward T. Fairchild, Hon. John D. Wickhem, Hon. George B. Nelson, Hon. Joseph Martin, Justices. Arthur A. McLeod, Clerk.

Be it remembered that heretofore, to-wit: on the fifteenth day of June in the year of our Lord One Thousand Nine Hundred and Thirty-nine came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the F. W. Woolworth Company, a foreign corporation, by its attorneys and filed in said Court its certain Notice of Appeal, according to the statute in such case made and provided, and also the Return to such appeal, of the Clerk of the Circuit Court of Dane County, in said State, in words and figures following, that is to say:

STATE OF WISCONSIN, IN CIRCUIT COURT FOR DANE COUNTY

Notice of Appeal

F. W. WOOLWORTH Co., a foreign corporation, Appellant,

vs

WISCONSIN TAX COMMISSION, Respondent

Circuit Court, Dane County, Wis. Filed Jun 13, 1939. Myrtle L. Hansen, Clerk.

You will please take notice that F. W. Woolworth Co., a foreign corporation, appellant in the above proceeding, hereby appeals to the Supreme Court of the State of Wisconsin from the judgment rendered and entered in this action in the Circuit Court for Dane County, Wisconsin, on the 10th day of June, 1939, in favor of the respondent and against the appellant, which said judgment confirmed an order of the Wisconsin Tax Commission dated December 19th, 1938, and the assessment and tax imposed thereby and denied appellant's claim for refund, and from the whole of said judgment.

A copy of said judgment appealed from is hereto annexed.

Dated, June 12, 1939.

Davies, Auerbach, Cornell & Hardy, & Ela Christianson & Ela, Attorneys for Appellant.

To: John E. Martin, Esq., Atty. General of State of Wisconsin.

Harold H. Persons, Esq., Asst. Atty. General of State of Wis. Clerk of the Circuit Court for Dane County, Wisconsin.

Filed: June 15, 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

State of Wisconsin, in Circuit Court for Dane County

Circuit Court, Dane County, Wis. Filed Jun. 13, 1939. Myrtle L. Hansen, Clerk.

Filed Jun. 15, 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

Judgment

F. W. Woolworth Co., a foreign corporation, Appellant,

vs.

Wisconsin Tax Commission, Respondent

At the regular March 1939 term of the Circuit Court, begun and held in the Court House in the City of Madison in said county, and on the 10 day of June, 1939 of said term. Present the Hon. August C. Hoppmann, Circuit Judge presiding.

The above entitled proceeding was brought to review an order of the Wisconsin Tax Commission dated December 19th, 1938, which said order of the Wisconsin Tax Commission affirmed the assessments and the tax imposed upon dividends declared by the F. W. Woolworth Co., a foreign corporation, being dividends of December 2nd, 1935, March 2nd, 1936, June 1st, 1936, September 1st, 1936, December 1st, 1936 and March 1st, 1937, and which said order further denied the claim of F. W. Woolworth Co. for refund in respect to taxes paid on account of dividends paid December 2nd, 1935; the matter coming on to be heard at said term under the provisions of the Wiscon-

sin Statutes, and particularly Sec. 71.16 thereof, the appellant appearing by Davies, Auerbach, Cornell & Hardy of New York City, and Ela, Christianson & Ela of Madison, Wisconsin, its attorneys, and the respondent appearing by the Attorney General and Harold H. Persons, Esq., Assistant Attorney General of the State of Wisconsin, and the Court having on this 10 day of June, 1939 filed its decision confirming said order and said assessment and tax and affirming the order of the Wisconsin Tax Commission denying the claim for refund of F. W. Woolworth Co. on account of tax paid on dividends declared December 2nd, 1935 and directing that judgment be entered in accordance therewith, and notice so provided by Sec. 71.16 (8), Wisconsin Statutes, of application for the entry hereof having been duly waived in writing by the attorneys for the appellant, F. W. Woolworth Co., a foreign corporation.

Now, therefore, upon the record, files and proceedings in the above entitled appeal and on motion of the attorneys for the Wisconsin Tax Commission,

It is adjudged that said order of the Wisconsin Tax Commission dated December 19th, 1938 and the said assessment and tax imposed thereby and the denial thereof of appellant's claim for refund, be and the same are in all respects confirmed without costs to either party, except that the appellant F. W. Woolworth Co. shall pay the clerk's fee.

By the Court,

August C. Hoppmann, Judge.

Bond No. S-139814

Filed Jun. 15, 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

State of Wisconsin, in Circuit Court for Dane County

Undertaking on Appeal

F. W. Woolworth Co., a foreign corporation, Appellant,

vs.

Wisconsin Tax Commission, Respondent

Whereas, on the 10th day of June, 1939 in the Circuit Court for Dane County, Wisconsin, a judgment was entered

confirming the order of the Wisconsin Tax Commission dated December 19th, 1938 and the assessment and tax imposed thereby and denying appellant's claim for refund on portion of the tax paid, and the said F. W. Woolworth Co., a foreign corporation, feeling aggrieved thereby intends to appeal therefrom to the Supreme Court of the State of Wisconsin,

Now, therefore, the undersigned Royal Indemnity Company of New York City, New York, a corporation duly licensed to do business in the State of Wisconsin, does hereby, pursuant to statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against it on said appeal, not exceeding Two Hundred Fifty ($250.00) Dollars.

Dated at Madison, Wisconsin, this 12 day of June, A. D. 1939.

Royal Indemnity Company of New York, by Theodore Herfurth, Attorney-in-fact. (Seal.)

In Presence of: Mildred Subey, Katherine LeBarro.

Power of Attorney

(Endorsements)

Original

Service admitted this 13th day of June, 1939. Myrtle L. Hansen, Clerk.

STATE OF WISCONSIN,
Circuit Court, Dane County:

F. W. WOOLWORTH Co., a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent.

NOTICE OF APPEAL AND UNDERTAKING ON APPEAL

Filed June 15, 1939, Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

Circuit Court, Dane County, Wis. Filed Jun. 13, 1939. Myrtle L. Hansen, Clerk.

Ela, Christianson & Ela, 1 West Main Street, Madison, Wis., Attorneys for Appellant.

Due service admitted this 13th day of June, A. D. 1939. John E. Martin, Atty. General of Wis., By H. H. Persons, Asst. Atty. Genl., Attorneys for Respondent.

And afterwards, to-wit: on the 6th day of November, A. D. 1939, the following stipulation was filed in this cause:

IN SUPREME COURT, STATE OF WISCONSIN

August Term, 1939. No. 97

F. W. WOOLWORTH COMPANY, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent.

STIPULATION

It Is Hereby Stipulated and Agreed by and between the Appellant-Plaintiff by its attorneys at law, and John E. Martin, Attorney General of the State of Wisconsin and Harold H. Persons, Assistant Attorney General of the State of Wisconsin, as attorneys for the Wisconsin Tax Commission, Respondent, and for the State of Wisconsin and Elmer E. Barlow, Commissioner of Taxation of Wisconsin, that the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of Wisconsin, may be made parties defendant and respondent in the above-entitled matter and that an order may be made and entered to that effect forthwith and without any further notice to any of the parties.

Dated October 30, 1939.

Davies, Auerbach, Cornell & Hardy, Ela, Christianson & Ela, Attorneys for Appellant-Plaintiff. John E. Martin, Attorney General of the State of Wisconsin. Harold H. Persons, Assistant Attorney General of the State of Wisconsin, Attorneys for Respondent, Wisconsin Tax Commission, and for the State of Wisconsin, and Elmer E. Barlow, Commissioner of Taxation of Wisconsin.

Upon the foregoing Stipulation,

It Is Hereby Ordered: That the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of Wisconsin be and the same hereby are made defendants and respondents in the above-entitled matter.

Dated this 6th day of November, 1939.

By the Court.

Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin.

And afterwards to wit on the 7th day of November, A. D. 1939, the same being the 21st day of said term, the following proceedings were had in said cause in this Court:

Dane Circuit Court

F. W. Woolworth Company, a foreign corporation, Appellant,

vs.

Wisconsin Tax Commission, Respondent

And now at this day came the parties herein, by their attorneys, and this cause having been argued by G. Burgess Ela, Esq., for the said appellant, and by Harold H. Persons, Esq., Assistant Attorney General, for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

And afterwards, to wit: on the 16th day of January, A. D. 1940, the same being the 4th day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

Dane Circuit Court

F. W. Woolworth Company, a foreign corporation, Appellant,

vs.

Wisconsin Tax Commission, Respondent

Opinion by Chief Justice Rosenberry

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of

the Circuit Court of Dane County, in this cause, be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter judgment setting aside the assessment and allowing the claim for refund made by the plaintiff.

Justice Fowler dissents.

Thereupon the opinion of the Court by Chief Justice Rosenberry was filed in words and figures following, that is to say:

IN SUPREME COURT, STATE OF WISCONSIN, AUGUST TERM, 1939

No. 97

F. W. WOOLWORTH COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

Appeal from a judgment of the circuit court for Dane county. August C. Hoppmann, Circuit Judge, presiding. Reversed.

This action was begun on January 11, 1939, by F. W. Woolworth Company, a foreign corporation, plaintiff, against the Wisconsin Tax Commission, defendant, to set aside an assessment of a tax imposed under the provisions of sec. 3, ch. 505, Laws of 1935, as amended, sec. 70.61, Stats. and to recover a refund. From the judgment entered on June 10, 1939, confirming the assessment and denying claim for refund, the plaintiff appeals.

ROSENBERRY, C. J.

The principal question involved in this case is that considered and determined in the case of J. C. Penney Company vs. Wisconsin Tax Commission, decided herewith. For the reasons stated in that case the judgment in this case must be reversed.

By the Court.—The judgment appealed from is reversed and cause remanded with directions to enter judgment setting aside the assessment and allowing the claim for refund made by the plaintiff.

IN SUPREME COURT, STATE OF WISCONSIN

F. W. WOOLWORTH COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause in this Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 29th day of March, A. D. 1940.

Arthur A. McLeod, Clerk of Supreme Court, Wisconsin. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U. S.
FILED
APR 10 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. [redacted] 47

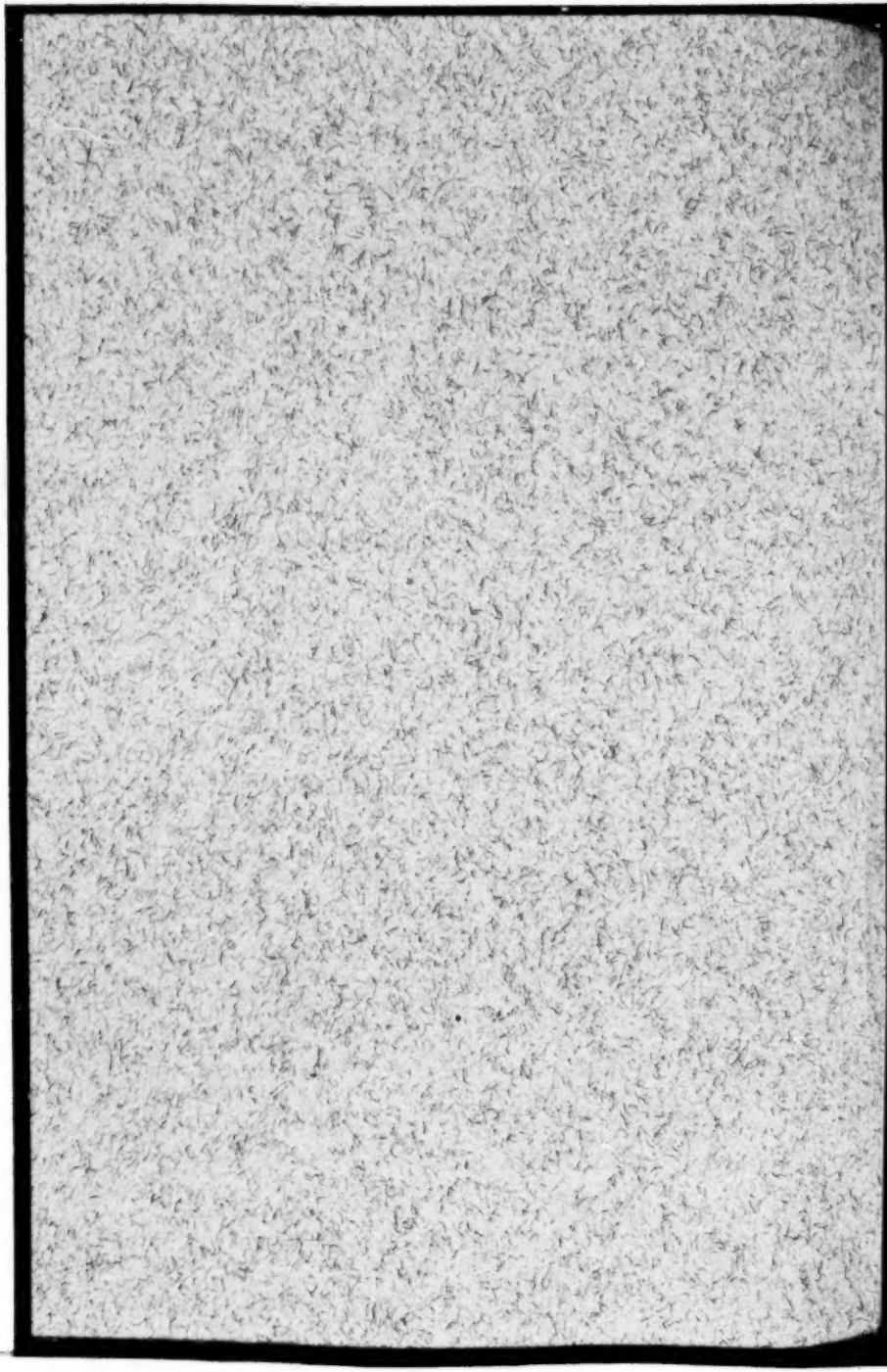
STATE OF WISCONSIN AND ELMER E. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,
Petitioners,

vs.

F. W. WOOLWORTH COMPANY, A NEW YORK CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

JOHN E. MARTIN,
Attorney General of Wisconsin,
JAMES WARD RECTOR,
Deputy Attorney General of Wisconsin,
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Petitioners.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 893

STATE OF WISCONSIN AND ELMER E. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,
Petitioners,

vs.

F. W. WOOLWORTH COMPANY, A NEW YORK CORPORATION.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of the State of Wisconsin, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This petition is filed to obtain a review of the judgment of the Supreme Court of the State of Wisconsin, dated January 16, 1940, in the case of *F. W. Woolworth Company, a foreign corporation* v. *Wisconsin Tax Commission,* hold-

ing invalid an assessment of taxes against the F. W. Woolworth Company, a New York corporation, doing business in the State of Wisconsin pursuant to the laws thereof. The said judgment of the Supreme Court of the State of Wisconsin reversed a judgment of the Circuit Court for Dane County, Wisconsin, confirming an assessment of said taxes against said F. W. Woolworth Company, a corporation, as affirmed by a decision and order of the Wisconsin Tax Commission, dated July 21, 1938 (R. 77).

This petition is companion to the petitions for writs of certiorari, filed with this Court at the same time, to review the judgments of the Supreme Court of Wisconsin, entered on the same date as the judgment here sought to be reviewed, in the cases of *J. C. Penney Company, a foreign corporation* v. *Wisconsin Tax Commission* and *Minnesota Mining and Manufacturing Company, a foreign corporation* v. *Wisconsin Tax Commission.* The judgments in the three cases, while separate, were entered on the same date and are all based on the opinion of the Supreme Court of Wisconsin filed in the case of *J. C. Penney Company, a foreign corporation* v. *Wisconsin Tax Commission.* Thus, the petitions to this Court for writs of certiorari in all three cases present the same question and are companion.

The taxes involved, in the sum of $20,058.33, were assessed pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which imposes a tax upon corporate dividends paid out of income derived from property located or business transacted in the State of Wisconsin, the same statute involved in the petitions in the *J. C. Penney Company* and *Minnesota Mining and Manufacturing Company* cases, companion hereto. A copy of said Section 3 of Chapter 505, Laws of Wisconsin of 1935, effective upon its publication on September 26, 1935, and as amended by Chapter 552, Laws of Wisconsin of

1935, effective upon publication thereof on October 8, 1935, is printed as an Appendix to this petition.

Said taxing statute is a special act and imposes a tax on "all corporations (foreign and local)" "equal to two and one-half percentum of the amount of" dividends declared and paid, after the passage thereof and prior to July 1, 1937, out of income derived from property located and business transacted in Wisconsin. It provides that such tax shall be deducted and withheld by the corporation from the dividends paid to both residents and nonresidents of Wisconsin and that the corporation is made liable for the tax and the payment thereof.

In Subsection (4) thereof it is specifically provided that as to corporations doing business within and without the State of Wisconsin the tax shall apply only to dividends declared and paid out of income derived from business transacted and property located in Wisconsin and that the amount of income of such a corporation attributable to the State of Wisconsin shall be computed in the same manner as is provided in Chapter 71 of the Wisconsin Statutes, the general Income Tax Law of the State of Wisconsin, for the determination of the income of such type of corporations allocable as Wisconsin income.

The facts involved and upon which the Supreme Court of the State of Wisconsin based its judgment are not in dispute, and, while different, are in substance the same as in the companion case involving the J. C. Penney Company.

The F. W. Woolworth Company is a New York corporation, having its statutory office at Watertown, New York, and its principal business office in the Woolworth Building, New York City, New York. During the years involved it was engaged in the business of operating a chain of retail mercantile stores in 29 States, the District of Columbia and Cuba, and owns all or a part of the stock in other corporations engaged in the same business in the other 19 States,

Canada, Great Britain and Germany (R. 44). It is licensed to do business in the State of Wisconsin but has no executive office of any kind located within the State (R. 4). During the years 1934, 1935 and 1936 it operated about 55 stores in Wisconsin (R. 39). Computed on the Wisconsin tax basis, the corporation had a total net income during the year 1934 of $27,808,579.19, in 1935 a total net income of $24,606,991.08, and in 1936 a total net income of $25,102,-593.64 (R. 4). Applying the formula of the Wisconsin income tax statute (Section 71.02, Wisconsin Statutes 1935) $555,538.44 of the 1934 net income was allocable to Wisconsin business, $579,548.66 of the 1935 net income was allocable to Wisconsin business, and $576,522.38 of the 1936 net income was allocable to Wisconsin business (R. 4).

On each of the following dates, to-wit: December 2, 1935, March 2, 1936, June 1, 1936, September 1, 1936, December 1, 1936, and March 1, 1937, the F. W. Woolworth Company declared a dividend on all its outstanding stock, and on each of said dates paid a total dividend of $5,850,000. Of each of said dividends $5,822,167.80 was paid on shares outstanding in the hands of stockholders, and the balance of $27,832.20 of each dividend was paid upon shares outstanding but held in the Company's treasury (R. 5). Each of these dividends was declared by the board of directors at meetings held in New York City, New York (R. 34).

The F. W. Woolworth Company operates its business in the following manner: from the proceeds from sales of goods in each store, including Wisconsin stores, the local manager pays the local expenses such as payrolls and small supplies. He deposits the balance above these requirements in a local bank. Periodically the Minneapolis district office draws on this bank account and when so drawn the moneys are combined at the Minneapolis office with moneys similarly drawn from banks from other States in the Minneapolis district. No attempt is made to keep the money sep-

arate from the different States. The Minneapolis office uses the moneys so received to pay merchandise bills, alteration, and other expenses (R. 35). A separate accounting for each store is kept at the Minneapolis office (R. 41). From time to time the district office accumulates funds above these requirements which are transmitted to the main office in New York City and deposited in New York banks to the credit of the corporation (R. 35). From the funds deposited in New York salaries, general overhead expenses in New York and other offices, taxes and dividends are paid (R. 36). All of the stockbooks, minute books and secretary's records of the corporation are kept in the State of New York. All transfers of shares of stock are made by the New York transfer agent of the corporation; all directors and stockholders' meetings are held in the State of New York (R. 36). All dividends are declared at such meetings (R. 34). The actual payment of dividends is effected by a check drawn upon the bank account of the corporation in New York, payable to its transfer agent, City Bank Farmers Trust Co. of New York City for the total amount of each dividend declared. The transfer agent then prepares checks payable to each stockholder of record which it mails in New York City to the postoffice address of each stockholder as the same appears in the record (R. 34). No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders lived and received their mail in Wisconsin (R. 34). As of the said dividend dates there were in excess of 50,000 stockholders of the company owning 9,703,613 shares of which not more than 470 were residents of the State of Wisconsin owning not more than 14,597 shares (R. 7).

Pursuant to a notice of an additional assessment dated July 16, 1937, in accordance with the procedural provisions

of the Wisconsin statutes, the Wisconsin Tax Commission assessed a tax against the said F. W. Woolworth Company, a corporation, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which was ultimately adjusted at the sum of $20,058.33 (R. 50-52). The corporation duly filed its objections to said assessment and applied for a hearing thereon within the period, in the manner and as provided by the Wisconsin Statutes in such instances (R. 53, 54). Thereupon the matter was heard by the Wisconsin Tax Commission and on December 19, 1938, it entered a decision and order sustaining the assessment of said taxes, as adjusted in the amount of $20,058.33, exclusive of interest and penalties (R. 26).

The assessment of said taxes and the decision and order of the Wisconsin Tax Commission sustaining the same, upon the application of the corporation pursuant to the provisions therefor in the Wisconsin Statutes, were duly reviewed by the Circuit Court for Dane County, Wisconsin, and on June 10, 1939, judgment was entered therein confirming the same (R. 68). Upon appeal therefrom by the F. W. Woolworth Company in accordance with the Wisconsin Statutes, the Supreme Court of the State of Wisconsin on January 16, 1940, rendered its decision and judgment reversing the judgment of said Circuit Court and holding that said taxes so assessed, and the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, as applied to said F. W. Woolworth Company, under the facts as stated, were invalid as depriving the said F. W. Woolworth Company, a corporation, of its property without due process of law in violation of the 14th Amendment to the Constitution of the United States, based upon the opinion filed and the decision of the Supreme Court of Wisconsin in the case of *J. G. Penney Company, a foreign corporation,* v. *Wisconsin Tax Commission,* on the same date (R. 78). It is this decision and judgment of the

Supreme Court of the State of Wisconsin that is here sought to be reviewed.

The record upon which this petition is here presented is composed of the printed case as used in the Supreme Court of the State of Wisconsin, being pages numbered 1 to 71 of the Record as certified to this Court, together with the opinion of the Supreme Court of the State of Wisconsin and the proceedings therein, comprising pages numbered 72 to 79 of the Record as certified to this Court.

B.

Reasons Relied On for the Allowance of the Writ.

The reasons relied upon for the allowance of the writ are the same as those set out in the petition for certiorari in the companion cases of *J. C. Penney Company* v. *Wisconsin Tax Commission* and *Minnesota Mining and Manufacturing Company* v. *Wisconsin Tax Commission.*

1. The question presented is the constitutionality of the Wisconsin tax statute, Section 3 of Chapter 505, Laws of 1935 (as amended) as applied to the F. W. Woolworth Company, a New York corporation doing business in Wisconsin, under the facts as previously stated, and of the taxes of $20,058.33 assessed against said corporation pursuant to said taxing act. The facts relating thereto are not in dispute and are contained in the record made before the Wisconsin Tax Commission. No issue as to the facts was raised or presented in the State courts of Wisconsin and none now exists or is here presented. Likewise, no question has been raised, and none exists, as to the correctness of the procedure in the assessment of the taxes involved or in the review of the assessment in the court proceedings. Consequently, a discussion of those procedural matters is not relevant to the purposes of this petition.

The only controversy at issue involved in the proceedings in the State courts and decided by the Supreme Court of Wisconsin in rendering the judgment sought to be reviewed, is whether the Fourteenth Amendment to the Constitution of the United States precludes the State of Wisconsin from imposing the tax as provided in Section 3 of Chapter 505, Laws of 1935 (as amended), upon the F. W. Woolworth Company, a foreign corporation, under the facts set out in the record. This is solely a question of law and purely a Federal question. The judgment of the Supreme Court of Wisconsin sought to be reviewed is based solely on its decision upon that question. The petitioners contend that its decision upon said Federal question is erroneous and should be reversed.

2. Following notice of the assessment of the taxes involved and upon appropriate request therefor by the F. W. Woolworth Company, a hearing in respect to said assessment was had and conducted by the Wisconsin Tax Commission, which by order, dated December 19, 1938, sustained the assessment. Thereupon, pursuant to the statutes of Wisconsin providing therefor, the F. W. Woolworth Company appealed from the decision of the Wisconsin Tax Commission to the Circuit Court for Dane County, Wisconsin, and the Supreme Court of Wisconsin, successively. In the application for hearing before the Wisconsin Tax Commission (R. 54), and in the notice of appeal from the order of the Wisconsin Tax Commission to the Circuit Court for Dane County, Wisconsin (R. 2), the claim was made by the F. W. Woolworth Company that Section 3 of Chapter 505, Laws of Wisconsin of 1935 (as amended) as applied to it under the existent facts purports to impose a tax beyond the taxing jurisdiction of the State of Wisconsin, and therefore is invalid as violative of the due

process provision of the Fourteenth Amendment to the Constitution of the United States. The same claim was made on the appeal to the Supreme Court of Wisconsin, and its decision sustaining said claim of the F. W. Woolworth Company the petitioners contend is erroneous and should be reversed.

3. The Wisconsin Tax Commission held that it was without authority to pass upon the constitutional question involved (R. 25) and the Circuit Court for Dane County, Wisconsin, decided it adversely to the corporation (R. 67), upon the authority of the decision of the Supreme Court of Wisconsin upon the question, rendered in 1936 in *State ex rel. Froedtert G. & M. Co., Inc.* v. *Tax Commission* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478. In the cited case the Supreme Court of Wisconsin in an action for declaratory judgment had expressly declared Section 3 of Chapter 505, Laws of 1935 (as amended) to be constitutional as imposing a tax within the taxing jurisdiction of the State of Wisconsin as applied to both foreign and domestic corporations, over objection that it violated the due process provision of the Fourteenth Amendment to the United States Constitution. Upon appeal by the F. W. Woolworth Company to the Supreme Court of Wisconsin from the judgment of the Circuit Court for Dane County, Wisconsin, confirming the order of the Wisconsin Tax Commission and the adjusted taxes as there sustained, the corporation renewed its objection that as applied to it Section 3 of Chapter 505, Laws of 1935 (as amended) and the taxes assessed pursuant thereto were violative of the due process provision of the Fourteenth Amendment to the United States Constitution. The Supreme Court of Wisconsin sustained that objection and

overruled its prior decision in the case of *State ex rel. Froedtert G. & M. Co., Inc.* v. *Tax Commission* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, insofar as that prior decision held that said law imposed a valid tax as applied to foreign corporations doing business in Wisconsin under facts the same as those existent as to the F. W. Woolworth Company (R. 78). The petitioners contend that this decision upon the Federal question involved and overruling the prior decision thereon is erroneous and should be reversed.

4. The said decision of the Supreme Court of Wisconsin to the effect that Section 3 of Chapter 505, Laws of 1935 (as amended) was invalid as applied to foreign corporations was based squarely upon the decision of this Court in the case of *Connecticut General Life Ins. Co.* v. *Johnson* (1938), 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, which was decided by this Court subsequently to the decision in the case of *State ex rel. Froedtert G. & M. Co., Inc.* v. *Tax Commission* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478. Upon the basis of the facts existing in the instant case the Supreme Court of Wisconsin held that the decision of this Court in the case of *Connecticut General Life Ins. Co.* v. *Johnson* (1938), 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, was controlling and required it to overrule its prior decision upon the question and held that Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), as applied to a foreign corporation doing business in Wisconsin in the manner of the F. W. Woolworth Company, imposes a tax beyond the taxing jurisdiction of the State of Wisconsin. It is the contention of the petitioners that the Supreme Court of Wisconsin erred in so construing and applying the decision of this Court in

that case and that said decision is nether controllng nor applicable to the question here involved.

5. The petitioners, moreover, contend that no other decision of this Court holds that a tax such as that provided by Section 3 of Chapter 505, Laws of 1935 (as amended) as applied to foreign corporations doing business in the taxing State under and pursuant to the laws thereof, is contrary to the Fourteenth Amendment to the United States Constitution, and that no decision of this Court requires such a holding or sustains the decision of the Supreme Court of Wisconsin to that effect.

6. The petitioners further contend that although the precise question involved has not been passed upon by this Court, the decision of the Supreme Court of Wisconsin that Section 3 of Chapter 505, Laws of 1935 (as amended), as applied to foreign corporations doing business in Wisconsin, is invalid as contravening the due process clause of the Fourteenth Amendment to the United States Constitution, is not in accord with applicable decisions of this Court and assign the same as error for which said decision should be reviewed and reversed.

WHEREFORE, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Wisconsin, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 97, August Term, 1939, *F. W. Woolworth Company, a foreign corporation, Appellant,* v. *Wisconsin Tax Commission, Respondent,* and that the said judgment of the Supreme Court of Wisconsin may be reversed by this Honorable Court, and that your petitioners

may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

THE STATE OF WISCONSIN, AND
ELMER E. BARLOW,
as Commissioner of Taxation
of the State of Wisconsin,
By JOHN E. MARTIN,
Attorney General of Wisconsin,
JAMES WARD RECTOR,
Deputy Attorney General of Wisconsin,
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 893

STATE OF WISCONSIN AND ELMER E. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,
Petitioners,

VS.

F. W. WOOLWORTH COMPANY, A NEW YORK CORPORATION.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petition herein presents the identical question that is presented in the petitions for writs of certiorari in the two companion cases involving the *J. C. Penney Company* and the *Minnesota Mining and Manufacturing Company*, respectively. The jurisdictional claims, errors assigned and arguments are identical with those in the brief in support of the petition in the *J. C. Penney Company* case. While slightly different, the facts, so far as they relate to the question presented, are substantially the same.

I.

The Opinions of the Court Below.

The opinion in the Supreme Court of Wisconsin, filed January 16, 1940, is reported in 289 N. W. 685, but is not as yet reported in the official State reports (R. 78).

II.

Jurisdiction.

1. This petition is filed pursuant to Section 237b of the Federal Judicial Code (28 U. S. C. A. 344 (b)) which provides:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the Unted States; or *where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution,* treaties, or laws of the United States; *or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution,* or any treaty or statute *of,* or commssion held or authority exercised under, the *United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied.* Nothing in this paragraph shall be construed to limit or detract from the right to a review on an appeal in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on an appeal might be obtained under the preceding paragraph be

an obstacle to granting a review on certiorari under this paragraph." (Emphasis ours.)

2. Petitioners also rely on Rule 38 of the Rules of this Court and particularly on Paragraph 5 thereof which provides in part:

"5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this court."

3. The date of the judgment to be reviewed is January 16, 1940 (R. 77).

In its application for a hearing before the Wisconsin Tax Commission upon the assessment involved (R. 54) and in its pleadings upon the statutory appeal to the circuit court for Dane County, Wisconsin from the decision of the Wisconsin Tax Commission confirming the assessment (R. 2), the F. W. Woolworth Company, among other things, claimed immunity from the tax upon the ground that Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) in so far as it imposed a tax upon the Company was contrary to the Fourteenth Amendment to the United States Constitution because it taxed beyond the taxing jurisdiction of the State of Wisconsin and thus deprived the F. W. Woolworth Company of its property without due process.

The Circuit Court for Dane County, Wisconsin, upheld the validity of the tax in question as applied to the F. W. Woolworth Company upon the authority of *State ex rel.*

Froedtert G. & M. Co., Inc. v. *Tax Commission,* (1933) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, in which case the Supreme Court of Wisconsin in a declaratory judgment in 1936 had expressly sustained the validity of said tax law as applied to both foreign and domestic corporations over objection that it contravened the due process provisions of the Fourteenth Amendment to the Constitution of the United States (R. 67, 68).

The Supreme Court of Wisconsin, upon appeal from the Circuit Court, sustained the contention of the F. W. Woolworth Company and held that the said Section 3 of Chapter 505, (as amended) was invalid in so far as it purported to impose a tax upon the devolution of dividends of the F. W. Woolworth Company to its stockholders. The court thus expressly overruled its decision in the case of *State ex rel. Froedtert G. & M. Co. Inc.,* v. *Tax Commission,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, and did so specifically upon the authority of *Connecticut General Life Ins. Co.* v. *Johnson,* (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436 (R. 78).

Thus, a statute of the State of Wisconsin was held to be invalid upon the basis of an asserted conflict with the Fourteenth Amendment to the United States Constitution as interpreted by this Court.

The cases upon which petitioner relies in support of jurisdiction are:

Blodgett v. *Silberman,* (1928) 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410;

Boynton v. *Hutchinson Gas Co.,* (1934) 291 U. S. 656, 78 L. Ed. 1049, 54 S. Ct. 528;

Kelly v. *Washington ex rel. Foss Company,* (1937) 302 U. S. 1, 82 L. Ed. 3, 58 S. Ct. 87;

Coleman v. *Miller,* (1939) 307 U. S. 433, 83 L. Ed. 1385, 59 S. Ct. 972.

III.

Statement of the Case.

The controversy at issue arose out of an assessment of taxes, in the amount of $20,058.33, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) against the F. W. Woolworth Company, a New York corporation, doing business in the State of Wisconsin under and pursuant to the laws of Wisconsin. A copy of Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended by Chapter 552, Laws of Wisconsin, 1935) may be found in the Appendix herein. In substance, it imposes a tax on all corporations, foreign and local, equal to 2½% of the amount of dividends declared and paid out of income derived from property located and business transacted in the State of Wisconsin. The corporation declaring the dividend is made liable for the tax and required to deduct the same from the dividend.

The F. W. Woolworth Company, a New York corporation, requested a hearing upon the assessment before the Wisconsin Tax Commission (R. 54). The Wisconsin Tax Commission confirmed the assessment (R. 22). The F. W. Woolworth Company appealed to the Circuit Court for Dane County, Wisconsin and, as appears from the record on said appeal (R. 2), it alleged that Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) so far as it imposed the tax upon the F. W. Woolworth Company, was in conflict with the Fourteenth Amendment to the United States Constitution because it imposed a tax beyond the State's jurisdiction to tax and thereby deprived the company of its property without due process of law.

The Circuit Court for Dane County rejected the Company's claim of immunity from the tax and confirmed the assessment (R. 67).

Upon appeal from the judgment of the Circuit Court the Wisconsin Supreme Court reversed the judgment of the Circuit Court and upheld the Company's claim to immunity from the tax. Thus, the Court held that, in so far as the said Section 3 of Chapter 505 (as amended), imposed a tax upon the devolution of dividends from the F. W. Woolworth Company to its stockholders paid out of income earned in Wisconsin, it was contrary to the Fourteenth Amendment to the United States Constitution (R. 78). While other issues were raised in the case none was decided except the constitutional question to which reference has been made.

The facts material to the consideration of the questions presented have been covered and set out under heading "A" in the petition and in the interests of brevity and elimination of repetition the statement thereof is not here repeated. As previously stated the facts, so far as pertinent to the questions here presented, are in substance the same as those in the two companion cases involving the *J. C. Penney Company* and the *Minnesota Mining and Manufacturing Company.*

IV.

Specification of Errors.

1. The Supreme Court of Wisconsin erred in holding that Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended by Chapter 552, Laws of Wisconsin, 1935) as applied to the F. W. Woolworth Company, under the existing facts, imposed a tax beyond the taxing jurisdiction of the State of Wisconsin and therefore is invalid as in conflict with the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Wisconsin erroneously held that the assessment of the taxes involved, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin,

1935 (as amended by Chapter 552, Laws of Wisconsin, 1935), against the F. W. Woolworth Company, a corporation, under the existing facts constitutes a deprivation of property of the F. W. Woolworth Company without due process of law because beyond the taxing power of the State of Wisconsin and therefore is invalid as violative of the Fourteenth Amendment to the Constitution of the United States.

V.

ARGUMENT.

Summary of Argument.

POINT A. The Supreme Court of Wisconsin erroneously predicated the decision on the Validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) and the tax thereby imposed upon the decision of this Court in Connecticut *General Life Ins. Co.* v. *Johnson,* (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436.

POINT B. This Court has announced no decision construing the Fourteenth Amendment condemning the application of State tax laws such as Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) to foreign corporations doing business in the State in the manner of the F. W. Woolworth Company.

POINT C. On the contrary, applicable decisions of this Court sustain the validity of said Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) as applied to the F. W. Woolworth Company in the present case.

The arguments in this case upon the above points are identical with the arguments fully stated at length under the heading "V" in the brief in support of the petition for writ of certiorari in the companion case in this Court,

under the title, *State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of the State of Wisconsin, Petitioners,* v. *J. C. Penney Company, a Delaware corporation, Respondent,* filed at the same time as this brief. In the interests of brevity and elimination of repetition, such arguments will not be here repeated, but are expressly referred to, incorporated herein, and made a part hereof the same as if repeated and set forth at length herein.

The decision of the Supreme Court of Wisconsin, sought to be reviewed in this case, is based upon its opinion and decision in *J. C. Penney Company, a foreign corporation,* v. *Wisconsin Tax Commission,* reported in 289 N. W. 677, but not as yet reported in the official reports. The opinion of the Supreme Court of Wisconsin in the instant case reported in 289 N. W. 685 expressly says that the judgment in the instant case was rendered for the reasons stated in its opinion in the case of *J. C. Penney Company, a foreign corporation* v. *Wisconsin Tax Commission,* reported in 289 N. W. 677.

That counsel for the F. W. Woolworth Company, a New York corporation, the respondent herein, may be fully and completely presented with such arguments, copies of the brief in support of the petition for writ of certiorari in the companion case in this Court under the title, *State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of the State of Wisconsin, Petitioners,* v. *J. C. Penney Company, a Delaware corporation, Respondent,* will be furnished and served on respondent and its counsel as a part of and at the same time as the service of the brief herein.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and that to such end a writ of certiorari should be

granted and this Court should review the decision of the Supreme Court of Wisconsin and finally reverse it.

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JAMES WARD RECTOR,
Deputy Attorney General of Wisconsin,
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Petitioners.

APPENDIX.

Section 3, Chapter 505, Laws of Wisconsin, 1935, Effective on its Publication on September 26, 1935, and as Amended by Chapter 552, Laws of Wisconsin, 1935, Effective on its Publication on October 8, 1935, Provides:

Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corpo-

rate surplus and undivided profits derived from business transacted and property located within the state.

(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipt of dividends from which a privilege dividend tax has been deducted and withheld and the distribution thereof to its stockholders.

(7) For the purposes of this section dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividend or liquidating dividends.

(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury.

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Supreme Court of the United States,

OCTOBER TERM, 1939.

STATE OF WISCONSIN AND ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin, *Petitioners,* *vs.* F. W. WOOLWORTH CO., a New York corporation.	No. 893

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petition seeks to review a judgment of the highest court of Wisconsin, reversing a judgment of the Circuit Court for Dane County and remanding the cause with directions to enter judgment setting aside an assessment and allowing the claim for refund made by F. W. Woolworth Co. under the so-called Wisconsin Privilege Dividend Tax Law.

The opinion below is *F. W. Woolworth Co.* v. *Wisconsin State Commission,* 289 N. W. 685 and is not yet officially reported.

Statement of Facts.

The Act (Chap. 505 of 1935 Laws of Wisconsin) is nominated a "Privilege Dividend Tax" "for the privilege of declaring and receiving dividends out of income derived and business conducted in this state".

Violation of State Constitution was invoked on the record (R. pp. 3, 13, 14, 15, 16, 17, 18, 46), and was assigned as error on the brief below (p. 5). The State Tax Commission found that the assessment was not constitutionally

objectionable (R. pp. 25, 26). The intermediate Court considered the questions as raised on briefs and particularly the constitutional question (R. p. 67). The Supreme Court, in reversing, stated no grounds in its judgment (R. p. 78) or in its opinion (R. p. 78) save a reference for reasons to its opinion in the companion *Penney* case, (*J. C. Penney Co.* v. *Wisconsin Tax Commission*, 289 N. W. 677) wherein it recited, at p. 679, that the plaintiff contended that the law as applied to a foreign corporation was invalid "for the reason that it deprives the plaintiff of its property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States *and Art. VIII, Sec. 1 of the Constitution of the state of Wisconsin*".

Limitations on the question by reason of the text of the Act. Chap. 505 of 1935 Laws of Wisconsin provides in Section 3:

> "*Privilege Dividend Tax.* (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign or local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and non-residents by the payor corporation.
>
> • • • • • •
>
> (4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. • • •"

Obviously, a dividend declared in Wisconsin by either a foreign or local corporation and whether paid to residents or non-residents, is intended to be taxed. But there is no legislative intention expressed or inferable that dividends, declared, as here, outside Wisconsin by a foreign corporation were intended to be taxed.

Limitations on the question by prior decisions of the Court below.

In *State ex rel. Froedert Grain & Malting Co. Inc.* v. *Tax Commissioner of Wisconsin*, 265 N. W. 672 the relator was a Wisconsin corporation doing business in Wisconsin and in Minnesota. The Court construed the act as imposing a privilege tax "upon the transaction involved of transferring the dividends from the corporation to its stockholders" and stated that as a property tax or as imposed upon a non-resident it would be unconstitutional.

In *State ex rel. Froedert Grain & Malting Co. Inc.* v. *Tax Commissioner of Wisconsin*, 267 N. W. 52, on rehearing, the Court again construed the acts as taxing dividends declared *within Wisconsin*, saying:

> "The declaration of a dividend is as much of a transaction within the State as is the making out of a stock certificate. • • • Of course it does not follow that the state may impose the instant tax in case of a foreign corporation because it may impose it in the case of a domestic corporation. *The declaring of a dividend by a foreign corporation and transmittal of it would be done without the taxing state, and neither would be a transaction within it, nor would the funds out of which the dividends were paid be located within the taxing state at the time of the payment.*"

The Court, it seems to us, left open, in respect of the taxability of dividends declared outside Wisconsin by a foreign corporation, a question of local law depending in turn on a question of fact, which it expressed as follows:

> "• • • whether the dividends involved in the instant transfer tax, which have been earned within the state, have not such a constructive situs within this state as to render them subject to the tax imposed by the instant statute."

This question of fact it could not decide because there were no facts in the record to justify a decision. It stated:

> "It is not permissible for us on demurrer to the complaint to consider the factual statements on this brief" (an *amicus curiae* brief). "Nor can we take judicial notice of facts in this regard."

The Court concluded to "consider" the question however and stated:

> "The *fact* that the dividends are derived from earnings within the state gives them a constructive situs within the state."

The stipulated facts in the record herein are as follows:

> "That all meetings of the board of directors of the company at which dividends are declared are held in the State of New York; that all acts of the company or its agents in connection with the declaration and payment of such dividends are performed within and pursuant to the laws of the State of New York, and that the funds out of which such dividends are paid are kept in the State of New York" (R. p. 44).

The uncontradicted facts establish that on 1 March, 1937 F. W. Woolworth Co. had over 9 million shares of stock; that, roughly speaking 99% of its stockholders, holding 99% of its stock and receiving 99% of its dividends, were non-residents of Wisconsin. No act regarding the declaration, paying or transmitting of the dividend is performed within the State of Wisconsin (R. pp. 33, 34).

Under the New York Law (Penal Law § 664) it is a crime for a director to concur in any vote or act of directors making a dividend "except from surplus, and in the cases and manner allowed by law". Surplus is not identical with earnings; nor are the earnings of a particular state or even of a particular year earmarked as a separate portion of the surplus.

Determination of no business situs in respect of dividend in Wisconsin.

In the companion *Penney* case (*J. C. Penney Co.* v. *Wisconsin Tax Commission*, 289 N. W. 677) the Court below, at p. 682, stated:

> "The question here involved is one of the incidence of taxation and not whether the state has jurisdiction of certain corporate activities by reason of a business situs of a corporation. No claim is made that the plaintiff has any such situs nor is there any evidence in the record upon which such a claim can be based."

Summary of Argument.

(1) The determination by the Court below that the dividend of the foreign corporation had no business situs in Wisconsin was a determination of fact, in respect of local law and should not be reviewed herein.

(2) That the Court below in its method of determining the business situs of corporate intangibles did not infringe the rules most recently laid down by this Court should preclude review.

(3) The non-federal ground is sufficient to sustain the judgment of reversal.

POINT I.

The determination by the Court below that the dividend of the foreign corporation had no business situs in Wisconsin was a determination of fact, in respect of local law, and should not be reviewed herein.

The questions which the petitioner seeks to raise herein have been finally determined either as matters of construction in the prior decisions of the highest court of Wisconsin, or as matters of fact and of local law herein. The question of constructive situs which in *State ex rel.*

Froedert Grain & Malting Co. Inc. v. *Tax Commissioner of Wisconsin*, 267 N. W. 52, the Court raised but could not determine because of absence of factual record, it has now finally decided.

The Courts of and in Wisconsin have determined in a long series of decisions that the stock of a corporation does not acquire a business situs in Wisconsin merely because the corporation does business in Wisconsin.

In *Newport Co.* v. *Wisconsin Tax Commission*, 261 N. W. 884, the Court below, construing the Wisconsin Tax Act, held it in certain respects unconstitutional, at page 889 saying:

> "This company, domiciled in Delaware, with plants in several states, made investments and used the profits for the general purposes of the company, and we fail to see how this income, or the stock itself, can be said to have acquired a business situs in Wisconsin, any more than in any other place where its business activities were carried on."

See also:

Tyler v. *Dane County, Wis.*, 289 Fed. 843 (D. C. W. D. Wis.);
Estate of Shepard, 184 Wis. 88.

The Court below has again determined this question and has decided that there is no business situs within Wisconsin and that there is no evidence in the record of any business situs within Wisconsin.

This is a determination in respect of local law which should be accepted by this Court as conclusive.

Dawson v. *Kentucky Distilleries*, 255 U. S. 288, per Brandeis, J., at page 292;
Laurel Hill Cemetery v. *San Francisco*, 216 U. S. 358, per Holmes, J., at page 365;
Kryger v. *Wilson*, 242 U. S. 171, per Brandeis, J., at page 176.

The petitioners themselves recognize (Petition, p. 10) that the decision relates only "to foreign corporations doing business in Wisconsin *under facts* the same as those existent as to the F. W. Woolworth Co."

Whether the law of the State in respect of business situs of dividends of foreign corporations be declared by its Legislature in a statute or by its highest Court in a decision is not a matter of federal concern.

> *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, per Brandeis, J., at page 78.

The determination of fact—that there is no evidence in the record of business situs within Wisconsin—should not be reviewed by this Court.

> *Southern Power Co.* v. *Public Service Co.*, 263 U. S. 508, 509;
> *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440, 441;
> *United States* v. *Johnston*, 268 U. S. 220, 227;
> *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178;
> *Missouri K. & T. Ry.* v. *Zuber*, 256 U. S. 681;
> *National Labor Relations Board* v. *Waterman Steamship Corp.*, 84 L. Ed. 448, per Black, J.
> *Kansas City So. Ry.* v. *Albers Comm.*, 223 U. S. 573, 591.

POINT II.

That the Court below in its method of determining the business situs of corporate intangibles did not infringe the rules most recently laid down by this Court should preclude review.

In *Curry* v. *McCanless*, 307 U. S. 357, this Court at 366 in applying to the taxation of intangibles the rule of *McCulloch* v. *Maryland*, 4 Wheat. 316, 429 that the subjects over which the sovereign power of a state does not extend

are exempt from taxation, recognized jurisdictions depending both upon domicile of the owner of the intangible within the taxing state and upon the situs of the intangible within another taxing state.

In *Graves* v. *Elliott*, 307 U. S. 383, a power of disposition in respect of the intangible was held to justify taxation at the place of the domicile of the owner of the power.

In *Newark Fire Insurance Co.* v. *State Board of Tax Appeals*, 307 U. S. 313, the opinion of Mr. Justice Reed stated that there was a presumption that corporate intangibles were taxable solely by the state of the corporation's origin; that to be taxable elsewhere there must be definite evidence that the intangibles are integral parts of the business there conducted; that to overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of local activity.

1. The Court below has determined the fact and the local law without infringing any of these rules. The sovereign power of the state of Wisconsin does not extend to these dividends declared in New York by a New York corporation and paid by it to non-residents of Wisconsin. The Court below has held that there is no evidence in the record that these corporate intangibles have any business situs in Wisconsin. The New York dividends are certainly not definitely connected as an integral part of Wisconsin activity. The stipulated facts preclude any connection whatsoever. And the New York Penal Statute prohibits any connection whatsoever.

2. In view of *Connecticut General Co.* v. *Johnson*, 303 U. S. 77, it cannot be said that the state Court "has decided a federal question of substance not theretofore determined by this Court" within the meaning of Rule 38 (5-a).

The attempt to distinguish the *Johnson* case (p. 18 of petition in *Penney* case) is unconvincing. California surely had as much connection with earnings from the reinsurance

of California risks, involved in the *Johnson* case, as Wisconsin did with the declaration in New York of dividends which it would be a crime to pay out of anything but "surplus", unsegregated as to source. The alleged difference does not involve any question of public importance, justifying review by this Court.

3. Petitioners also argue that the case has been decided "in a way probably not in accord with applicable decisions of this Court" (Rule 38(5)(a)).

Their contention in this respect (pp. 20-23 of petition in *J. C. Penney* case) is that an income tax measured in the same way as the "Privilege Dividend Tax" would be valid. While we do not concede that dividends declared in New York can be a measure of income taxable in Wisconsin, we regard the question of the nature of the tax as conclusively fixed by the holding of the Wisconsin Supreme Court in *State ex rel. Froedert Grain & Malting Co. Inc.* v. *Tax Commissioner of Wisconsin*, 265 N. W. 672 as one imposed upon the privilege of transferring the dividends from the corporation to its stockholders (whether the stockholders are residents of Wisconsin or not).

It is not argued that the decision of the Wisconsin courts that the tax is imposed on the privilege of making a dividend involves a federal question. There would be no substance to such a claim. Nor is there any merit in the claim that this Court should intervene to determine the validity of a tax on the theory that it would be constitutional if it were regarded as a different sort of tax from what the Wisconsin courts have interpreted it to be.

The argument (pp. 22-23 of Petition in *J. C. Penney* case) that it is a tax upon stockholders for the privilege of doing business in Wisconsin has no basis either in the Wisconsin court's construction of the Wisconsin law, or in the applicable decisions of this Court. It is far from constituting a "special and important reason" for granting review (Rule 38(5)).

POINT III.

The non-federal ground is sufficient to sustain the judgment of reversal.

The state and federal constitutions set forth similar grounds of invalidity in respect of the statute. Both state and federal constitutions were invoked by F. W. Woolworth Co. on the record throughout the proceeding below and in brief before the Supreme Court. Neither in judgment nor in opinion did the highest Court refer to either state or federal constitution. In its opinion it (*F. W. Woolworth Co. Wisconsin Tax Commission*, 289 N. W. 685) referred, at p. 686, to its opinion in the *Penney* case for its grounds of reversal—but there also, although it recites that violations of both state and federal constitution were raised, (*J. C. Penney Co.* v. *Wisconsin Tax Commission*, 289 N. W. 677, at p. 679) it does not state whether one or the other, or both, grounds resulted in reversal. The statements in the petition and brief that the reversal was for violation of the 14th Amendment (pp. 6, 8, 9, 11, 15, 16, 18, 19), are thus unwarranted. No certificate has been rendered. Federal jurisdiction may be found only if diligently sought after, against previously stated rules. The opinion below falls far short of complying with the rule that there must be an explicit statement that it reversed solely because of violation of the federal constitution.

Leathe v. *Thomas*, 207 U. S. 93, per Holmes, J. at page 98;
Lynch v. *New York ex rel. Pierson*, 293 U. S. 52;
Siler v. *Louisville & Nashville R. R.*, 213 U. S. 175, 193;
Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288, Brandeis concurring at page 347;
Bachtel v. *Wilson*, 204 U. S. 36, 41;
Johnson v. *Risk*, 137 U. S. 300, 307;
Wood Co. v. *Skinner*, 139 U. S. 293, 297;
Honeyman v. *Hanan*, 300 U. S. 14;
New York City v. *Central Savings Bank*, 306 U. S. 661.

After the Court below had in a prior case held that the declaring of a dividend by a foreign corporation and transmittal of it would be done without the taxing state, its determination herein in respect of the absence of business situs within Wisconsin of the foreign dividend made unnecessary the decision of any federal question and deprives this Court of jurisdiction.

Marrow v. *Brinkley*, 129 U. S. 178, 181.

POINT IV.

The petition for certiorari should be denied.

Respectfully submitted,

EDWARD CORNELL,
MARTIN A. SCHENCK,
ORRIN G. JUDD,
G. BURGESS ELA.

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Supreme Court of the United States,

OCTOBER TERM, 1940.

No. 47.

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,
Petitioners,
against
F. W. WOOLWORTH CO.

BRIEF FOR RESPONDENT.

Certiorari by this Court to the Supreme Court of Wisconsin was granted on the 20th of May, 1940 (R. 79) to review a judgment of reversal by which the Supreme Court of Wisconsin set aside a tax assessment and held that the Wisconsin Privilege Dividend Tax Act was invalid as to foreign corporations.*

The Opinions of the Court Below.

The opinion of the Court below is printed at page 78 of the Record and is reported in 233 Wis. 305.

The opinion to which it refers for the reasons of reversal —*J. C. Penney Co.* v. *Wisconsin Tax Commission*,—is reported in 233 Wis. 286.

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* *Italics, unless otherwise stated, ours.*

Jurisdiction.

Petitioners invoked jurisdiction under Section 237b of the Federal Judicial Code and under Rule 38 of the Rules of this Court, and asserted that solely a question of law and purely a federal question were involved.

Respondent in opposition urged that the Court below had recited in its opinion that respondent had invoked violation of the State Constitution as well as of the Federal Constitution, and argued that the non-federal ground was sufficient to sustain the reversal.

When the citizen raises as against a state in a state court the claims that a state statute violates rights under both the State and Federal constitutions and the court holds that the statute is unconstitutional, it has presumably held that the statute violates its state constitution even although in reaching its conclusion it followed a federal case.

In *Minnesota* v. *National Tea Co.*, 309 U. S. 551 where a somewhat similar situation was presented (violation of State and Federal Constitutions being claimed and the State Court influenced to its conclusion by a federal case) this court departed from its usual practice, and remanded the cause to the Supreme Court of Minnesota for clarification in respect of this court's jurisdiction. The Supreme Court of Minnesota then in an opinion filed 27 September 1940 stated:

> "Counsel for the state in oral argument and brief have urged that we write our present 'decision in those cases on such a basis that the Supreme Court of the United States will have unquestioned jurisdiction to review' it. We think so to do would be both unwise and improper. Judicial duty does not permit us to shift or avoid the responsibility resting upon us to exercise our own honest judgment in the 'interpretation of our own constitution' with finality."

Had the court below in the case at bar not passed upon the question primarily before it either alone or in connection with the similar federal question, it would have been easy for the attorney general to have obtained its certificate to that effect.

In accordance with long established doctrine this Court is without jurisdiction.

Leathe v. *Thomas*, 207 U. S. 93;
Lynch v. *New York, ex rel. Pierson*, 293 U. S. 52.

The Statute.

Section 3, Chapter 505, Laws of Wisconsin, 1935, as Amended by Chapter 552, Laws of Wisconsin, 1935, provides:

> "Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.
>
> (2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.
>
> (3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.
>
> (4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and

property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipts of dividends from which a privilege dividend tax has been deducted and withheld and the distribution thereof to its stockholders.

(7) For the purposes of this section, dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividend or liquidating dividends.

(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury."

Statement of Case.

It was stipulated by the parties that F. W. Woolworth Co. is a New York corporation conducting a retail mercantile business in 29 states of the United States (including Wisconsin, the District of Columbia, and Cuba), and through subsidiaries, in the remaining 19 states of the United States, and in Canada, Great Britain and Germany. The statutory principal office of the Company, at which stockholders' meetings are held, is in New York, and the principal business office at which meetings of Directors are held is in New York (R. 44). It is also stipulated:

> "That all meetings of the Board of Directors of the Company at which dividends are declared are held in the State of New York; that all acts of the Company or its agents in connection with the declaration and payment of such dividends are performed within and pursuant to the laws of the State of New York, and that the funds out of which such dividends are paid are kept in the State of New York" (R. 44).

At the time of the declaration of the first dividend involved herein F. W. Woolworth Co. had total shares issued (except treasury) of 9,703,613. Its total stockholders were 50,180. The total dividends paid (except on treasury shares) were $5,822,167.80. The number of Wisconsin shareholders was 457. The total shares held by Wisconsin residents were 14,597. The dividends paid to Wisconsin residents were $8,758.20. The percent of dividends paid to Wisconsin residents was .1504% (Exhibit 10, fifth tabulation, printed opposite page 66 of Record).

In respect of the method of declaring dividends, the Record shows:

> "• • • With respect to the method and procedure used in the paying of dividends, the dividends are declared by the Board of Directors at meetings held

at 233 Broadway, New York, and paid by our transfer agents, City Bank Farmers Trust Company, 22 William Street, New York. The checks are written by that transfer agent and we issue one check to the transfer agent for the total amount of dividends payable. That transfer agent is a bank in New York City. The dividends are then transmitted to the stockholders by placing the same in the mail in New York City. Our board of directors adopts a form of resolution at the time of declaring the dividend. No act regarding the declaring or paying or transmitting of the dividend is performed within the State of Wisconsin, and there was no such act performed during any of the years 1935, 1936 or 1937" (R. 34).

The Record further shows:

" • • • None of the meetings of the Board of Directors of the company have ever been held in the State of Wisconsin. No meetings of stockholders have ever been held in the State of Wisconsin. Stockholders' meetings are held at Watertown, New York. In the payment of dividends we do not make any attempt to earmark any particular source of the money from which the dividends are paid or any particular period during which the moneys were produced which were used for payment of dividends. The dividends are paid out of the general funds of the company" (R. 36).

In respect of the method of business, the Record shows:

" • • • We have stores operating in Wisconsin and in all of the other states of the Union. The gross receipts from sales from the stores in Wisconsin are handled in the following manner: after the money gets into the till of the local store from gross receipts from sales the local manager pays local bills such as salaries and small supplies that he needs in the store. He deposits the balance above those requirements in a local bank. That bank maintains the money and periodically our Minneapolis office draws on the bank account. The manager has no jurisdiction over the

money after it is placed in the bank account and has nothing to do with the transmittal of the money from the local bank. No one in Wisconsin has anything to do with the withdrawal of that money from any Wisconsin bank. This surplus money in the Wisconsin bank is taken to the Minneapolis office where it is combined with money received from banks in various other states under the jurisdiction of the Minneapolis office. No attempt is made to keep the money separate from the different states. The Minneapolis office uses this money in the payment of merchandise bills, alteration, improvements, accounts or any other expenditures that they have. From time to time the Minneapolis office accumulates sufficient funds above their requirements, and those are transmitted to the main office in New York, placed in the bank account in New York, from which bank account money is from time to time transferred to the City Bank Farmers Trust Company, from which the dividends are paid. The general corporation expenses are paid out of the funds in New York under the direction of officers who have their offices in New York City and who perform their duties in New York City" (R. 34-36).

The Minneapolis office takes in Minnesota, part of North Dakota, Iowa, part of Nebraska, part of Michigan, and Wisconsin. There is a staff of about 100 at the Minneapolis office, supervising approximately 150 stores (R. 39).

Summary of Argument.

(1) The Act as imposing a tax on the privilege of declaring in New York dividends by a New York corporation has properly been held unconstitutional.

(2) The Act as imposing a tax upon the privilege of a nonresident stockholder to receive, outside Wisconsin, dividends declared in New York by a New York corporation, has properly been held unconstitutional.

(3) Wisconsin did not get jurisdiction to tax foreign declared and paid dividends on any constructive situs within Wisconsin of the dividend itself or of the transaction of declaring or receiving the dividend outside of Wisconsin, and the Court below properly so held.

(4) Petitioners' brief presents no theory under which the Act can be sustained and shows no error in the decision below.

(5) To sustain the Act as imposing a tax on such part of the dividend as Wisconsin law decrees contains Wisconsin earnings would deny full faith and credit to the laws of New York in respect of dividends.

ARGUMENT.

POINT I.

The Act as imposing a tax on the privilege of declaring in New York dividends by a New York corporation has properly been held unconstitutional.

This statute in its clearly expressed and inseparable features assumes jurisdiction:

(1) over the privilege of declaring, outside Wisconsin, a dividend by a foreign corporation;

(2) over the privilege of receiving, outside Wisconsin, a dividend by a nonresident stockholder;

(3) over the dividend declared to foreign stockholders, for the tax is to be deducted from it;

(4) over the foreign payor corporation in respect of the dividend, for it is directed to deduct it from the dividend;

(5) in respect of the constituent parts or sources of the foreign dividend, for it decrees that the dividend is divisible

and in part contains income derived from Wisconsin property.

The stipulation between the parties herein is that all the acts of the Corporation or of its agents in connection with the declaration and payment of its dividends are performed within and pursuant to the laws of the State of New York; and that the funds out of which the dividends are paid are located in New York (R. 44). And the detailed testimony, concerning which there is no dispute, re-enforces these summary facts that the dividend as to source, legal and financial, is exterior to Wisconsin.

In *State ex rel. Froedtert G. & M. Co.* v. *Tax Commission*, 221 Wis. 225, the Court at page 242 said:

> "Of course it does not follow that the State may impose the instant tax in case of a foreign corporation because it may impose it in case of a domestic corporation. The declaring of a dividend by the foreign corporation and the transmittal of it would be done without the taxing state and neither would be a transaction within it, nor would the funds out of which the dividend was paid be located within the taxing state at the time of the payment."

In *J. C. Penney Co.* v. *Tax Commission*, 233 Wis. 286, the Court at page 289 said:

> "No act in connection with the payment of dividends was performed within the State of Wisconsin, and no act in connection with the receipt of such dividend was performed in the state of Wisconsin, except that certain stockholders of the Company received their mail in this state."

The Court at page 291 stated that it had previously, in the *Froedtert* case, held that the Act "imposed an excise tax upon the transaction involved of transferring the dividends from the Corporation to its stockholders". It held at page 292 that on the basis of an excise tax it cannot be imposed

"upon the dividends declared by a foreign corporation because they are not declared within this State, nor is the privilege one granted by this State". The Court at page 297 concluded:

> "We are obliged to hold that the transaction of declaring and receiving the dividend in question was not taxable in the state of Wisconsin."

The Court below was led to this conclusion by the recent decision of this Court in *Connecticut General Co.* v. *Johnson*, 303 U. S. 77, and after reviewing such case, at page 296 stated:

> "In our view the California case" (i. e. Connecticut General *v.* Johnson) "is a stronger case for jurisdiction to tax by a state than is the present case * * *."

In *Connecticut General Co.* v. *Johnson*, 303 U. S. 77, the appellant was a Connecticut corporation admitted to do an insurance business in California. In addition to its business conducted within that State, it had entered into contracts with other insurance corporations likewise licensed to do business in California, re-insuring them against loss on policies of life insurance effected by them in California and issued to residents there. These re-insurance contracts were entered into in Connecticut, where the premiums were paid and where the losses, if any, were payable.

This Court held that California did not have jurisdiction to tax the re-insurance in Connecticut of California risks, at page 80 saying:

> "But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it."

In *McCulloch* v. *Maryland*, 4 Wheat 316, 429, the Court said:

> "All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation."

It is well recognized that to sustain a privilege tax the privilege must be enjoyed in the state imposing it. *Provident Savings Society* v. *Kentucky*, 239 U. S. 103.

Petitioners herein at p. 48 of their brief state:

> "It is perfectly evident that the State of Wisconsin may not, as an independent basis of taxation, tax the exercise of a privilege which it does not grant. Neither may it, as an independent basis of taxation, impose a tax upon a transaction which occurs without its territorial jurisdiction."

The petitioners, also on page 48 of their brief, state that they do not disagree with the "first" proposition of the Court below which on page 47 they set forth as follows:

> "(1) The exercise by a foreign corporation without the state of the power to declare and pay a dividend is not in itself taxable by the State of Wisconsin, since
>
> (a) The privilege to declare the dividend is not granted by the State of Wisconsin, and,
>
> (b) The physical acts of declaring and paying the dividend do not occur within the territorial limits of Wisconsin."

The petitioners also state as a part of their point heading on page 47:

> "The declaration and payment of dividends outside the State of Wisconsin by a foreign corporation does not itself constitute an event taxable by Wisconsin *and the court below properly so held.*"

The due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere.

Conn. General Co. v. *Johnson*, 303 U. S. 77, and cases cited at page 81.

The determination of the court below as to the incidence of the tax, follows logically the language of the act and is here controlling.

Colorado Bank v. *Bedford*, 310 U. S. 41, 52.

POINT II.

The Act as imposing a tax upon the privilege of a nonresident stockholder to receive, outside of Wisconsin, dividends declared in New York by a New York corporation, has properly been held unconstitutional.

There is no ambiguity in the Act, and no construction can be involved to eliminate its essential feature, which is to deduct a tax from a dividend for the privilege of receiving it. The act constitutes a novel and extreme attempt to reach beyond state boundaries for taxpayers. The tax allocable to dividends received by Wisconsin residents amounts to less than five dollars per dividend (R. 10, 11). The tax amounts to about $2700 on dividends of about $5,800,000 paid on 9,750,000 shares to over 50,000 stockholders. (Tables A and C printed opposite p. 66 of Record.) It thus runs into impossible fractions of a cent per share. F. W. Woolworth Co. at no time deducted any of the taxes from the dividend paid its stockholders (R. 10) and the Tax Commission took the position that when the corporation pays the tax and does not withhold it from dividends there is in effect an additional dividend to the stockholders equal to the amount of such tax (R. Table B, opposite page 66).

In *State ex rel. Froedtert G. & M. Co.* v. *Tax Commission*, 221 Wis. 225, the Court recognized the unconstitutional feature of the Act as imposing a tax on the privilege of the nonresident stockholder of receiving the dividend, and it seems to us, struggled to eliminate it from the statute. It said at page 232:

> "It is contended that the language imposes a tax upon the recipient of the dividend. The language is perhaps susceptible to the construction that the legislature so considered it. * * * However, the legislature may have regarded the tax, we have no difficulty in construing the statute as imposing an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders."

The Court stated at page 234 that the Act was claimed unconstitutional as to nonresident stockholders "as an attempt to tax nonresidents over whom the State has no jurisdiction", and at page 235 said:

> "If the tax were considered as a property tax, or as a tax imposed on the nonresident, this would be correct. But the tax is an excise tax, a tax on the transaction involved."

On the motion for rehearing, the Court at page 243 said:

> "The brief on motion for rehearing assumes that we have held the tax imposed by statute to be against the corporation. We did not in the original opinion take the position that the tax is necessarily one against the corporation. * * * If the tax is an excise tax, and we hold that it is, it is entirely immaterial upon whom the burden of it ultimately falls."

In *J. C. Penney Co.* v. *Tax Commission*, 233 Wis. 286, the Court at page 295 stated that in the *Froedtert* case it had rejected the contention that the tax was a tax on property.

The essential feature of the Act, as a tax on the foreign stockholder or upon the privilege of the foreign stockholder

to receive a foreign dividend, with the payor corporation constituted the collection agent outside Wisconsin in violation of its New York contract with stockholders, cannot be defended.

In *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania*, 153 U. S. 628, the railroad company was organized under the laws of the State of New York. Part of its road was in Pennsylvania. Pennsylvania assessed a tax upon its bonds owned by Pennsylvania citizens, and required its treasurer in New York when making payment of interest on the bonds to deduct and pay the tax into the Pennsylvania state treasury. This Court at page 645 said:

> " * * * It assumes to do what the State has no authority to do, to compel a foreign corporation to act, *in the State of its creation*, as an assessor and collector of taxes due in Pennsylvania from residents of Pennsylvania. Under the sanction of the laws of New York, the defendant corporation executed prior to the passage of the act of 1885 bonds, with interest coupons attached, payable in that State and not elsewhere. It gave mortgages to secure the payment of those bonds and coupons, according to their tenor. Neither the bonds, nor the coupons, nor the mortgages, contain anything that would, in law, justify the company in refusing to meet its obligations, according to their terms and without deduction on account of taxes due from the holders of such bonds or coupons residing in another State." (Italics the court's.)

See also *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 435.

In the case at bar Wisconsin is attempting to compel a foreign corporation in New York, the state of its incorporation, to collect a tax on a debt which it owes another nonresident, in the impairment of its New York obligation and in violation of its New York contract with its stockholders.

No attempt is made in the Attorney General's brief to uphold the constitutionality of this statute in this, its

essential feature, and it is admitted that the payment of dividends ouside the State of Wisconsin by a foreign corporation does not constitute an event taxable by Wisconsin (Petitioners' Brief, pp. 47, 48). And it seems to be admitted at page 56 of Petitioners' brief that the State of Wisconsin may not impose a tax upon the recipient of a dividend where such recipient is a nonresident.

But these obviously (and seemingly admittedly) unconstitutional features condition and characterize the entire Act and constitute its enforcement machinery. They cannot be eliminated and leave any part of the Act operative against the foreign corporation. The act of payment of a dividend is entire and indivisible. That act and every element in it is admittedly beyond the jurisdiction of Wisconsin.

It may be a simple matter for the Legislature of Wisconsin to revise the Act so that it becomes another income tax act against the corporation, but it transcends, we respectfully submit, the proper function of this Court to do so or to suggest that the Court below should have done so. Yet it seems to us that the petitioners' brief is mainly directed, after an abandonment of the essential features of the Act, to an attempt to obtain from this court a revision of the statute into an income tax act imposed upon the corporation.

It is not thus allowable to ignore the avowed purpose and operation of the plain terms of the act.

United States v. *Butler*, 297 U. S. 1, 58;
Liggett Co. v. *Lee*, 288 U. S. 517, 535;
Matson Navigation Co. v. *United States*, 284 U. S. 352.

POINT III.

Wisconsin did not get jurisdiction to tax foreign declared and paid dividends on any constructive situs within Wisconsin of the dividend itself or of the transaction of declaring or receiving the dividend outside of Wisconsin, and the Court below properly so held.

Petitioners admit that inasmuch as the privilege is not granted by Wisconsin, its exercise is not in itself taxable by Wisconsin and that the Court below properly so held (Pet. brief, pp. 47, 48). Petitioners thus have a heavy burden to show that the Court below, after properly holding that the privilege was beyond taxing jurisdiction on well recognized grounds, erred in not at the same time holding that the privilege was within taxing jurisdiction on other better recognized or more dominant considerations. Any method of attempting to bring the Act back within jurisdiction must be fictional. Legal fictions are impossible of application to a privilege actually exercised beyond Wisconsin boundaries. No court which has admittedly properly held that it is exercised outside Wisconsin can be charged with error in not adopting a contradicting fiction. No fiction can protect the privilege from impairment and confusion and respondent's rights from violation. No fiction can pretend that a privilege admittedly exercised in and granted by New York has its fractional exercise in 47 other states of the Union.

The only fiction ever suggested herein has been properly resolved against petitioners.

In *State ex rel. Froedtert G. & M. Co.* v. *Tax Commission*, 221 Wis. 225, the action was for a declaratory judgment, brought in the first instance in the Supreme Court of Wisconsin. It was brought by a domestic corporation. The Court, in its original opinion, upheld the Act in respect of

domestic corporations, but made a number of strong suggestions that the Act was unconstitutional in respect of foreign corporations. On motion for rehearing the Court repeated the doubts it had expressed in regard to the constitutionality of the tax as a privilege tax on foreign corporations, at page 242 saying:

> " • • • Of course, it does not follow that the state may impose the instant tax in case of a foreign corporation because it may impose it in case of a domestic corporation. The declaring of a dividend by the foreign corporation and the transmittal of it would be done without the taxing state, and neither would be a transaction within it, nor would the funds out of which the dividend was paid be located within the taxing state at the time of the payment."

At pages 242 and 243 it suggested that there was a question of whether "the dividends involved in the instant transfer tax, which have been earned within the state, have not such a constructive situs within this state as to render them subject to the tax imposed by the instant statute."

The Court suggested that the domestic corporation could not raise questions as to elements of unconstitutionality which did not affect it. It also suggested that there were no facts in the Record in regard to such questions, and that it could not consider facts stated in an *amicus curiae* brief submitted by a foreign corporation. It, however, did suggest, as to dividends of foreign corporations, at page 245:

> "The fact that the dividends involved are derived from earnings within the state gives them a constructive situs within the state."

In the case at bar, the rights of a foreign corporation under the statute were directly involved and were presented to the Court below on an ample factual record. It was stipulated that all acts of the Company or its agents in connection with the declaration and payment of the dividends are

performed within and pursuant to the laws of the State of New York and "that the funds out of which such dividends are paid are kept in the State of New York" (R. 44).

The detailed facts are not in dispute (Petitioners' Brief, pp. 6, 8), and amply support the stipulation of the Wisconsin Tax Commission that the funds out of which the dividends are paid are New York funds.

In *J. C. Penney Co.* v. *Tax Commission*, 233 Wis. 286, the second headnote reads:

> "The fact that a fund which became the subject of a transaction in one State was earned in another State and might have been taxed there does not give such transaction a situs within the other State for the purpose of taxation."

The Court at page 293 referred to its prior decision in the *Froedtert* case, and stated that to meet an objection as to the constitutionality of the Act the Court had, on rehearing, held that the dividend "declared by a foreign corporation was taxable to the extent that it was allocable to business transacted or property situated in this State because the dividend involved the distribution of earnings made within the state and such earnings had a constructive situs within the state." It stated at page 295 that in the *Froedtert* case it had "rested the right of Wisconsin to tax the dividend in question on the ground that that part of the dividend taxed having been earned within the state, the transaction of declaring and receiving the dividend had a situs within the state although the transaction took place in another state".

The Court then determined against constructive situs, at page 297 saying:

> "The question here involved is one of the incidence of taxation and not whether the state has jurisdiction of certain corporate activities by reason of a business situs of a corporation. *No claim is made that the plaintiff has any such situs nor is there any evidence in the record upon which such a claim can be based.*"

The petitioners state at page 6 of their brief that the detailed facts are not in dispute and that "no issue as to the facts was raised or is presented in the cases in the state courts of Wisconsin and none now exists or is presented." The testimony in the Record and the stipulation of the Wisconsin Tax Commission that all of the acts of the Company or its agent in connection with the declaration and payment of the dividends are performed within and pursuant to the laws of the State of New York, and its stipulation that the funds out of which dividends are paid are kept in the State of New York (R. 44) quite justified the Court below in its conclusion that no contention was made or could be made of any business situs of the corporation in Wisconsin justifying the tax on the dividends or the privilege of declaring or receiving them.

It would be absurd, moreover, to give dividends constructive situs in 47 different States.

The dividend is an intangible existing as a relationship between corporation and stockholder by virtue of the New York contract, and made effective through New York control and New York protection.

See *Curry* v. *McCanless*, 307 U. S. 357, 365, 366.

In *Newark Fire Ins. Co. v. State Board of Tax Appeals*, 307 U. S. 313, in the opinion of Mr. Justice Reed it was stated that there was a presumption that the intangibles of a corporation be taxed solely at the State of its domicil; that where consideration has been given to the existence of a business situs of intangibles for taxation by a State other than the State of domicil, "there has been definite evidence that the intangibles were an integral part of the business conducted." And a practical rule in the matter was stated —"To overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of the local activity."

The decision of the Court below is also in accordance with the previous Wisconsin decisions on this subject of no business situs acquired in Wisconsin for the purpose of taxing corporate intangibles.

Newport Co. v. *Wisconsin Tax Commission*, 219 Wis. 293, 306 (cert. denied 297 U. S. 720);
Tyler v. *Dane County, Wis.*, 289 F. 843, (approved in *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. [illegible], 81, 83);
Estate of Shepard, 184 Wis. 88;
Stone v. *Wisconsin Tax Commission*, 197 Wis. 71, 74.

This determination is a factual determination. No other conclusion can be reached in respect of the facts of this Record, particularly in view of the stipulation of the parties. The factual determination is in respect also of the local law, and should be accepted by this Court.

Dawson v. *Kentucky Distilleries Co.*, 255 U. S. 288, 292;
Laurel Hill Cemetery v. *San Francisco*, 216 U. S. 358, 365;
Kryger v. *Wilson*, 242 U. S. 171, 176.

As we read petitioners' brief no claim is made that the court below erroneously determined on the facts of the record that there was no constructive situs to justify the tax.

POINT IV.

Petitioners' brief presents no theory under which the act can be sustained and shows no error in the decision below.

We cannot agree with petitioners' analysis of the case of *State ex rel. Froedtert G. & M. Co. Inc.* v. *Tax Commission*, 221 Wis. 225, made throughout their brief and more particularly at pages 24-26, and 30 thereof.

The Court therein in respect of the statute's application to foreign corporations made a number of suggestions of invalidity but made only one suggestion of validity, viz.--that the foreign declared dividend might have a constructive situs within Wisconsin. It argued by analogy to inheritance or estate taxes in respect of the application of the statute to domestic corporations, where the devolution of property by virtue of the declaration of the dividend would, it argued, be within Wisconsin. At page 242 it recognized that such an analogy would be inappropriate to the application of the statute to dividends declared outside Wisconsin by a foreign corporation, because declaration, transmittal, payment, the transaction, and the fund would all be outside the taxing state. The only suggestion of possible validity in respect to the statute as to foreign corporations was that of constructive situs of the dividend. Judge Fowler, who wrote the opinion in the *Froedtert* case, in his dissenting opinion herein attempted to sustain the statute solely on the theory of constructive situs.

But the Court below came to the conclusion on an ample factual record that there could be no constructive situs of the dividend or of the acts of declaration or receipt which justified the tax.

Petitioners' brief relies upon analogy to inheritance taxes, discarded by the Court below in respect of application to foreign corporations, but does not assert or claim or argue error in the Court below in its determination that the dividend could have no constructive situs in Wisconsin.

The Court below was obviously of the opinion that the only suggested theory on which the Act could be sustained in respect of foreign declared dividends was that of constructive situs, for, after considering its prior suggestions in respect of constructive situs in the *Froedtert* case, and after considering and quoting from this Court's opinion in *Connecticut General* v. *Johnson*, as holding therein that the transaction in Connecticut did not have a situs within the

State of California for the purpose of taxation, it said (*J. C. Penney Co.* v. *Wisconsin Tax Com.*, 233 Wis. 286, 297):

> "If there is *no situs for taxation purposes* in the one case, there certainly is not in the other. We are obliged to hold that the transaction of declaring and receiving the dividend in question was not taxable in the state of Wisconsin.
>
> *Diligent and able counsel for the state have been unable to suggest any other basis upon which the tax involved in this case can be sustained than that suggested in the Froedtert case.*"

The Court then said:

> "The question here involved is one of the incidence of taxation and not whether the state has jurisdiction of certain corporate activities by reason of a business situs of a corporation. *No claim is made that the plaintiff has any such situs nor is there any evidence in the record upon which such a claim can be based.*"

The argument is made throughout petitioners' brief that the statute in its application to foreign declared dividends is analogous to inheritance taxes. In all of the cases cited there were jurisdictional contacts which do not exist in the case at bar. In *Curry* v. *McCanless*, 307 U. S. 357 and *Graves* v. *Elliott*, 307 U. S. 383, jurisdiction of one state to tax was based on control over the right of succession by reason of domicile and jurisdiction of the other state was based on the location of property. In *State ex rel. Froedtert G. & M. Co.* v. *Tax Comm.*, 221 Wis. 225, the Court recognized the inapplicability of the analogy to inheritance tax cases, at 242 saying:

> "The declaring of a dividend is as much of a transaction within the state as is the making out of a stock certificate. If the state may impose a tax on the one transaction, it may on the other. Of course, *it does not follow* that the state may impose the instant tax in case of a foreign corporation because it may impose it in case of a domestic corporation.

The declaring of a dividend by the foreign corporation and the *transmittal* of it would be done without the taxing state, and *neither* would be a *transaction* within it, nor would the *funds* out of which the dividend was paid be located within the taxing state at the time of the payment."

We realize that the Wisconsin Legislature has decreed that the dividends of all foreign corporations are, as a matter of law, declared out of Wisconsin profits, and petitioners (not attacking the factual determination to the contrary) of necessity must attempt to support this Act solely by reason of such legislative mandate.

If the Wisconsin legislature has decreed such a conclusive presumption that the Court below was without power to determine the question on the stipulated facts, then the statute is lacking in due process.

Manley v. *Georgia*, 279 U. S. 1, 6;
Heiner v. *Donnan*, 285 U. S. 312, 325.

The contention was raised below (R. 19) and was argued below (Woolworth brief below, p. 20).

The assumption by Wisconsin of jurisdiction to decree the legal content of a New York dividend involves a further violation of respondent's constitutional rights which we discuss in the following point.

POINT V.

To sustain the Act as imposing a tax on such part of the dividend as Wisconsin law decrees contains Wisconsin earnings would deny full faith and credit to the laws of New York in respect of dividends.

Respondent below, in addition to invoking on the record and arguing the violation of, due process clauses, contended that the Act was in violation of State and Federal Constitutions in that it impaired the contract of its stock-

holders with it under its general corporate charter and under the dividend resolutions by which its shareholders received a right to the dividends in question (R. 18). It also contended that the Act was unconstitutional under Article IV, Section I of the Constitution of the United States because it fails to give full faith and credit to the laws of the State of New York and the corporate charter, by-laws and resolutions of F. W. Woolworth Co. drawn pursuant thereto, which give it the right to conduct its business and declare dividends in the State of New York (R. 19).

In its brief below, this respondent argued that the Act was unconstitutional in that it impaired the obligation of the contract between it and its stockholders, and in that the application of the Act to F. W. Woolworth Co. failed to give full faith and credit to the public acts of the State of New York, the state of its incorporation (Woolworth Brief below, pp. 5, 19, 24, 26, 28).

These matters now assume importance because of the main argument of the Attorney General. For he argues (despite the contradicting factual determination in respect of no constructive situs) that Wisconsin may find a basis of taxation in the New York dividend as including a devolution of Wisconsin earnings.

Thus the efforts of petitioners to maintain the Act as a tax on the transfer or devolution of *Wisconsin earnings in the dividend* involve an even more extreme violation of respondent's constitutional rights. *For there are no Wisconsin earnings in the Woolworth dividend save by virtue of the legislative mandate which purports to decree such a dividend content.* And such Wisconsin mandate is directly against the law of the State of New York pursuant to which it is stipulated (R. 44) the dividends are paid.

Under the New York law, the directors may declare dividends out of surplus. The amounts that they leave in the business and the amounts that they separate into divi-

dends rest in their judicially uncontrolled discretion. What may be the territorial source of portions of the surplus or in what period of time it accrued is of no consequence under the New York law and cannot be forced into the directors' discretion. And as soon as the dividend is declared and segregated from surplus, the corporation becomes a trustee for its payment to the stockholders. It is absolutely owing to the stockholders. The corporation has no right, title or interest therein, and the owners of the 9,750,000 shares of stock are creditors of the corporation for the dividend in accordance with the contractual relationships determined by the certificate of incorporation.

New York Stock Corporation Law, Sec. 58;
New York Penal Law, Sec. 664;
Liebman v. *Auto Strop Co.*, 241 N. Y. 427, 433;
Jermain v. *Lake Shore & Michigan Southern Railway Co.*, 91 N. Y. 483, 492;
Strout v. *Cross, Austin & Ireland Lumber Co.*, 283 N. Y. 406, 413;
Ford v. *Snook*, 205 App. Div. 194 (affd. 240 N. Y. 624).

The dividend in the case at bar is peculiarly a creature of New York law. It is an intangible existing by virtue of a relationship between corporation and stockholder made effective only through New York control and protection. New York law is the origin of the rights which constitute it.

See *Curry* v. *McCanless*, 307 U. S. 357, 365, 366.

It is argued in petitioners' brief that although Wisconsin may not tax the privilege of declaring the dividend, it may tax the dividend after it is declared by reason of its power to decree that it contains Wisconsin earnings. It is claimed that inasmuch as Wisconsin can tax Wisconsin earnings, it may find them or follow them through New York bank accounts and general surplus into New York dividends. Thus, it is asserted, the dividend is a devolution

from corporation to stockholder of earnings from Wisconsin which, for taxable purposes, occurs within the state (Petitioners' Brief, pp. 46, 47, 50).

The far-reaching effects of such a claim of jurisdiction should be noted. What Wisconsin may do, every other State in the Union may do. We must not only contemplate 48 privilege taxes on each dividend, but we must face 48 different laws as to the legal incidents and contents of each dividend—48 different jurisdictions legislating as to the relationships between corporation and 50,000 stockholders in respect of 9,750,000 shares of stock.

This law of Wisconsin and the laws of New York are here in conflict. New York directs that the dividend be from surplus and paid without deduction under a trustee obligation. Wisconsin directs that the dividend be from Wisconsin earnings, and determines tax deduction by what the corporation does with its property in New York.

A corporation has a right (as a matter of due process under the Fourteenth Amendment) to have preserved from such burdensome confusion its multitudinous contractual relationships with its stockholders. This Court has repeatedly held that the Constitution in its full faith and credit clause enjoins upon all other states the laws of a corporation's domicil in respect of distribution of funds to its stockholders. This, we submit, is a more precise statement of the necessities of due process, as an element of a right to the maintenance of boundaries between state governments under the "bond of the constitution".

In *Royal Arcanum* v. *Green*, 237 U. S. 531, a fraternal beneficiary corporation had been organized under the general laws of Massachusetts. By a vote of the Supreme Council, the amount of dues was increased, and these changes were recognized in a litigation in Massachusetts, to which, however, Green was not a party. In Green's suit, brought in New York, it was decided that as a certificate

holder he had a contract which entitled him to prevent any increase of dues. The corporation contended that a violation of the full faith and credit clauses of the Constitution of the United States resulted from refusing to hold that the rights of the parties were to be determined by the Massachusetts law.

This Court at p. 542 said:

> "* * * The contradiction in terms is apparent which would rise from holding on the one hand that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying on the other hand that the duty of members was to be tested isolatedly and individually by resorting not to one source of authority applicable to all but by applying many divergent, variable and conflicting criteria. In fact their destructive effect has long since been recognized. *Gaines* v. *Supreme Council of the Royal Arcanum*, 140 Fed. Rep. 978; *Royal Arcanum* v. *Brashears*, 89 Maryland 624. And from this it is certain that when reduced to their last analysis the contentions relied upon in effect destroy the rights which they are advanced to support, *since an assessment which was one thing in one State and another in another, and a fund which was distributed by one rule in one State and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed.*"

This Court at page 546 said:

> "Coming then to give *full faith and credit to the Massachusetts charter of the corporation and to the laws of that State to determine the powers of the corporation and the rights and duties of its members*, there is no room for doubt that the amendment to the by-laws was valid if we accept, as we do, the significance of the charter and of the Massachusetts law applicable to it as announced by the Supreme Judicial Court of Massachusetts in the *Reynolds Case.*"

In *Modern Woodmen* v. *Mixer*, 267 U. S. 544, an action was brought in Nebraska by the beneficiary of a certificate issued presumably in South Dakota by a fraternal beneficial society incorporated in Illinois. A by-law of the corporation provided that long continued absence of any member unheard of should not give any right to recover on any benefit certificate until the full expiration of the term of the member's expectancy according to mortality tables. The Supreme Court of Illinois had upheld the validity of such a by-law, but the Supreme Court of Nebraska, disregarding the by-law, affirmed a judgment for the plaintiff. At page 551 this Court said, through Mr. Justice Holmes:

> *The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined by a single law,* is elaborated in *Supreme Council of the Royal Arcanum* v. *Green*, 237 U. S. 531, 542. The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation. *We need not consider what other States may refuse to do, but we deem it established that they cannot attach to membership rights against the Company that are refused by the law of the domicil.* It does not matter that the member joined in another State. In the above cited case Green became a member of a Massachusetts corporation in New York, and the State Court held on ordinary principles of contract that his rights were governed by New York law. *Green* v. *Royal Arcanum*, 206 N. Y. 591, 597. But the decision was reversed and it was held a failure to give full faith and credit to the Massachusetts charter as construed by the Massachusetts Court that Green was relieved by decree from paying assessments increased by the corporation after his contract was made."

In *Sovereign Camp* v. *Bolin*, 305 U. S. 66, an action had been brought on a fraternal beneficial certificate in Missouri. This Court held that the judgment of the Missouri Court enforcing the certificate denied full faith and credit to the acts, records and judicial proceedings of the State of Nebraska under which the fraternal beneficiary association was organized.

The relative rights and obligations of creditors and stockholders of corporations are so peculiarly within the regulatory power of the state of incorporation that Wisconsin has no interest in respect of dividends which can turn the scale of decision against the governmental interests of New York. No state other than New York can be said to have any public policy thereon (*Converse* v. *Hamilton*, 224 U. S. 243, 260).

The power which Wisconsin has to license F. W. Woolworth Co. to do business within its boundaries and to regulate such business does not extend to regulating the business of F. W. Woolworth Co. outside Wisconsin, which would otherwise be beyond its authority.

New York Life Ins. Co. v. *Head*, 234 U. S. 149, 161, 163, 164;
Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426, 435.

There is no necessity that the New York laws and statutes to constitute "public acts" be incorporated in a judgment.

John Hancock Ins. Co. v. *Yates*, 299 U. S. 178, 183.

The due process clause is a guaranty of a similar effect —that the state will be kept within its jurisdiction so as not to impair or penalize contracts and obligations existing pursuant to the laws of a sister state.

In *Burnet* v. *Brooks*, 288 U. S. 378, this Court at page 401 said:

> "Due process requires that the limits of jurisdiction shall not be transgressed. That requirement leaves the limits of jurisdiction to be ascertained in

> each case with appropriate regard to the distinct spheres of activity of State and Nation. The limits of State power are defined in view of the relation of the States to each other in the Federal Union. The bond of the Constitution qualifies their jurisdiction."

In *Milwaukee County* v. *White and Co.*, 296 U. S. 268, this Court at page 276 said:

> "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin."

In *Alaska Packers Assn.* v. *Comm'n*, 294 U. S. 532, this Court at p. 540 said:

> "The due process clause denies to a state any power to restrict or control the obligation of contracts executed and to be performed without the state, as an attempt to exercise power over a subject matter not within its constitutional jurisdiction." (Citing cases.) "Similarly, a state may not penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state." (Citing cases.)

POINT VI.

In the event this court determines that it has jurisdiction, the judgment below should be affirmed.

Respectfully submitted,

EDWARD CORNELL,
MARTIN A. SCHENCK,
G. BURGESS ELA.

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Supreme Court of the United States,

OCTOBER TERM—1940.

No. 47

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,
Petitioners,
against
F. W. WOOLWORTH CO.

PETITION FOR REHEARING.

F. W. Woolworth Co., for its petition for rehearing of the judgment of this Court announced December 23, 1940, respectfully shows:

The case is before this Court on writ of certiorari to the Supreme Court of Wisconsin to review a decision of that Court (233 Wis. 305), which held that the Wisconsin Privilege Dividend Tax Act was invalid as to F. W. Woolworth Co. (hereinafter sometimes termed "Woolworth"), a foreign corporation.

This Court, by its judgment, announced December 23, 1940, directed that the case be reversed and remanded for the determination of such questions as were open in the light of its opinion handed down December 16, 1940 in *Wisconsin* v. *J. C. Penney Company* (No. 46, October Term, 1940). The Woolworth case was decided on the authority of the *Penney* case, just referred to, and no separate opinion

was written, the matter being disposed of by an order of the Court, as follows:

> "Per curiam: Judgment reversed on authority of Wisconsin *v.* Penney Company, No. 46, decided Dec. 16, 1940. Mr. Justice Stone took no part in the consideration or decision of this cause."

Grounds of this Petition.

1. This Court decided the case on the basis of a new interpretation of the Wisconsin Privilege Dividend Tax Act, which had not been adopted by the Wisconsin court, and which had not been argued before this Court.

The Court treated the statute as imposing a supplemental corporate income tax—a view which no one had previously advanced, and which can be demonstrated to be untenable.

The statute (Section 3(1), Chapter 505, Laws of Wisconsin, 1935, as amended), describes the tax as being "For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state . . . "

The Wisconsin Supreme Court has construed the statute as imposing "an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders" (*State ex rel. Froedtert G. & M. Co. Inc.* v. *Tax Commissioner,* 221 Wis. 225, 233), or, differently stated, as "an excise tax on the transfer of earnings resulting from property located or business transacted within this state" (Id., p. 240). On the basis of that interpretation, it ruled in the *Froedtert* case that the taxability of dividends declared outside Wisconsin by a foreign corporation would depend upon their having a "constructive situs" within Wisconsin (p. 245). It was only on the basis of this possible constructive situs that the *Froedtert* case held that the tax might be valid as to foreign corporations; but the Wisconsin court, in the *Penney* case, found (233 Wis. at 296) that there was no evidence of any business situs in Wisconsin, and the

Woolworth case involved the same facts on that point (R. 78).

In the present case the Wisconsin Supreme Court adhered to the interpretation of the statute adopted in the *Froedtert* case, as "an excise or privilege tax upon the transaction involved of transferring dividends from the corporation to its stockholders" (233 Wis. at 291). No other interpretation of the tax was suggested, the Court stating:

> "Diligent and able counsel for the State have been unable to suggest any other basis upon which the tax involved in this case can be sustained than that suggested in the *Froedtert* case" (233 Wis. at 297).

In the Wisconsin Attorney General's brief to this Court he still described the tax as an excise on the transfer of corporate earnings (pp. 37, 46 and *passim*), and sought to sustain it by analogy to cases of transfer and estate taxes in connection with devolution by death.

This Court's decision was based upon a new theory, not advanced below and not argued here, namely, that "the practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin" (*Penney* opinion, p. 2), and that "by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out" (Id., p. 3).

No opportunity was afforded to argue either (1) whether such an additional income tax would be valid, or (2) whether a tax on the privilege of declaring or transferring dividends could be tested on the basis of its being a tax on income.

It may not be appropriate to argue at length in a petition for reargument, but several errors in this phase of the Court's ruling should at least be outlined.

(a) The first basis cited by this Court for its ruling was a statement that a special feature of the Wisconsin taxing system was the exemption of dividends from personal income tax, a fact which was described as giving "nourishing significance" to the tax under consideration (p. 3). This statement is incorrect.

The nature of the Wisconsin income tax system was not briefed or argued before this Court; the court's information appears to have been derived from the case of *Welch* v. *Henry*, 305 U. S. 134, which upheld a Wisconsin tax imposed in 1935 on certain 1933 dividends which had been exempt when received. Dividends on Woolworth stock were not and are not exempt from Wisconsin personal income tax. The Wisconsin statute permits the deduction from gross income only of dividends from corporations whose principal business is attributable to Wisconsin, which is defined as meaning corporations which derive 50% or more of their entire net income or loss from Wisconsin (Sec. 4(4), Chapter 71, Laws of Wisconsin, 1933). Admittedly, Woolworth derives less than 2½% of its total net income from Wisconsin (R. 4-5). Dividends paid by Woolworth to Wisconsin stockholders have been for many years and are at the present time taxed for normal income tax purposes. The opinion of this Court therefore is seen to be based upon a misconception of the Wisconsin income tax law.

This feature is of added significance when we consider that the present Wisconsin personal income tax discriminates against holders of stock in foreign corporations and in favor of holders of stock in corporations which derive 50% or more of their entire net income from Wisconsin sources. There is nothing inequitable in protecting foreign corporations from the incidence of the Wisconsin Privilege Dividend Tax when dividends of such foreign corporations are already subject to an income tax not imposed on dividends from local business.

(b) Another premise of the Court's opinion is that a determination of constitutionality is concerned only with the practical operation of the statute, and not the form of the tax. Again, the ruling is based (*Penney* opinion, p. 4) upon a citation (*Lawrence* v. *State Tax Commission*, 286 U. S. 276) which was not mentioned by the Wisconsin Attorney General. Moreover, the court presses the principle

to an extreme which we submit finds no basis in the actual holding of the *Lawrence* case.

The doctrine now advanced, that the Supreme Court, in passing on the validity of a tax, may disregard not only the description given to it by the Legislature and the measure prescribed in the statute, but also the considered judgment of the State court as to what is the nature of the tax, is one which was not invoked in this Court, which lacks support in the decisions of this Court, and which should not be adopted without an opportunity for thorough argument. The language of a statute and the construction given it by the state court should not be overthrown by the simple device of saying that the legislature and the court have used an improper "label". The importance of the precise terms of the statute was recognized by Justices Holmes and Moody, dissenting in *Chanler* v. *Kelsey,* 205 U. S. 466, 482, where they stated "that it has no bearing upon the matter, that by a different law the State might have derived an equal revenue from these donees in the form of a tax". Decisions of the state court concerning construction of a statute must be followed by the Supreme Court, even though the Supreme Court reserves the right to judge the actual operation of the tax (*Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; 294; *Morehead* v. *New York, ex rel Tipaldo,* 298 U. S. 587, 609). Less than six months ago, this Court unanimously held that "the determination of the State court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling." (*Colorado National Bank* v. *Bedford,* 310 U. S. 41, 52).

The *Bedford* case recognizes that the determination of what is the subject of a tax is a matter of construction rather than of mere "label", for the validity of the tax there depended on whether it was a tax on a national bank or a tax on its customers, and this Court followed the Colorado Court's construction of it as a tax on the customers. If the validity of the present tax depends—as the Court appears to consider—on whether it is a tax on earnings or on the transfer

of earnings,* the Wisconsin Court's determination that it is a tax on the transfer of earnings should equally be followed by this Court.

Even *Continental Assurance Co.* v. *Tennessee,* 85 L. Ed. * 42, which this Court cites in the Penney opinion, recognizes the conclusiveness of the state court's determination as to the incidence of the tax. In the *Continental Assurance* case a tax was upheld because the state court found it was levied upon the privilege of entering the state and engaging in the insurance business, although a similar tax had been held invalid when the state court construed the tax as being imposed upon the business of collecting premiums on policies insuring residents of the state (*Provident Savings Life Assurance Society* v. *Kentucky,* 239 U. S. 103, 111.)

(c) This Court construed the tax as a price for the privilege of carrying on business in Wisconsin, and held (Penney opinion, p. 5) that its validity flowed from the principle that a tax may be contingent upon events outside the state and still be sufficiently connected with transactions inside the state. The principle, so stated, may be valid, but it does not follow that this tax is valid. The principle was not invoked in the briefs or argument before this Court, and consequently no opportunity was afforded Woolworth to point out its basis or its limitations.

The Court (*Penney* opinion, p. 5), cited eight cases in support of its statement that a tax was not invalid because contingent upon events brought to pass without the taxing state. Only two of such cases were cited in the Wisconsin Attorney General's brief to this Court, and neither of those were cited for the point on which this Court relied. Examination of the cases cited by the Court reveals that all were quite different from the present situation. They in-

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* As pointed out in the *Woolworth* brief (p. 25), dividends of a New York corporation are not necessarily a distribution of earnings, but may be paid from contributed surplus, or from surplus resulting from a reduction of capital (N. Y. Penal Law, §664; Berle, Modern Corporations and Private Property 167n. 25).

volved questions which range from whether the protection given by Pennsylvania to the lives of its residents justified measuring a tax on a foreign life insurance corporation admitted to do business in Pennsylvania by premiums on policies insuring Pennsylvania residents even though collected outside Pennsylvania (*Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143), to whether a state may impose death taxes upon the devolution from a resident of intangible property held by a trustee outside the State (*Curry* v. *McCanless*, 307 U. S. 357). In each case the tax was clearly on a local subject-matter. If the parties are afforded a fair opportunity to discuss fully and argue before this Court the distinction between such cases and the present case we feel sure that this Court will recognize on the rehearing that they do not justify the Wisconsin Privilege Dividend Tax.

The Court has treated this tax as being levied on a local subject matter (the Wisconsin income), but measured by a foreign contingency (declaration of dividends in New York State). This reverses the actual situation which exists under the statute and the Wisconsin Court's ruling: the statute and the opinion below place the tax on a foreign subject matter (the dividend declared in New York) and uses the local subject (the Wisconsin income) only as a measure of the tax on the foreign subject matter.

(d) This Court's decision violates the sound principle that a case should not be reversed on the basis of points which were not advanced in the lower court.

> *Southern Railway Co.* v. *Kentucky*, 274 U. S. 76, 90-91 (dissenting opinion by Brandeis, J.);
> *New York* v. *Kleinert*, 268 U. S. 646, 650;
> *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 633;
> *Dewey* v. *Des Moines*, 173 U. S. 193, 199;

(e) Another consideration which is entitled to weight is the rule that where doubts exist as to constitutionality, a construction will be adopted, if admissible, which avoids the necessity of passing upon the constitutional question

(*Minnesota ex rel. Pearson* v. *Probate Court*, 309 U. S. 270, 274).

That the court was divided by five to four in the *Penney* case shows incontrovertibly that there was a serious constitutional question involved.

Analysis of the statute shows that it may be construed as applicable to certain foreign corporations without requiring that it be applied to Woolworth.

The tax is imposed "For the privilege of declaring and receiving dividends". Under the facts in the present record, it is clear that all acts relating to the declaration of dividends by Woolworth are performed outside Wisconsin and in New York, the state of its incorporation. Many corporations, however, hold their directors' meetings in states other than that of their incorporation. The statute would apply to a foreign corporation which has its principal place of business in Wisconsin and declares its dividends there—and whose stockholders, incidentally, enjoy exemption from personal income tax. There is no compulsion in its terms that it apply to foreign corporations which declare their dividends in the state of their incorporation, and have no business situs in Wisconsin.

2. The second ground for asking rehearing is that the Court sitting on the Woolworth case was equally divided, and the normal result should have been an affirmance of the Wisconsin decision holding the tax invalid as to Woolworth.

The *Penney* case and the accompanying *Minnesota Mining* case (No. 48, October Term, 1940), were decided by five to four. The Woolworth case was argued at the same time as those cases. Mr. Justice Stone, who was one of the majority in the *Penney* and *Minnesota Mining* cases, took no part in the decision of the Woolworth case. It therefore appears that the Court was divided four to four on the principles applicable to the Woolworth case. This should have brought about an affirmance of the decision of the Wisconsin court on the Woolworth case, under the principle stated in *Hertz* v. *Woodman*, 218 U. S. 205, 212-13, that it has been "the

invariable practice to affirm, without opinion, any judgment or decree which is not decided to be erroneous by a majority of the court sitting in the cause." If the Woolworth case had been argued alone it would have resulted in an affirmance by an equally divided court. Instead, it resulted in a decision which simply stated "Per curiam: The judgment is reversed on the authority of *Wisconsin* v. *Penney Company.*"

There is a special ground for requesting opportunity to be fully heard on all the points which have been relied on in the Court's opinion when they not only were not raised or argued by the briefs but also were the subject of so close a division within the Court.

CONCLUSION.

The petition for rehearing should be granted and the case reassigned for argument on new or supplemental briefs.

New York, January 9, 1941.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

The undersigned hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

MARTIN A. SCHENCK
ORRIN G. JUDD

No. 47. WISCONSIN ET AL. *v.* F. W. WOOLWORTH CO. Certiorari, 310 U. S. 619, to the Supreme Court of Wisconsin. Argued November 20, 1940. Decided December 23, 1940. *Per Curiam:* The judgment is reversed on the authority of *Wisconsin* v. *J. C. Penney Co., ante,* p. 435. MR. JUSTICE STONE took no part in the consideration or decision of this cause. *Messrs. Harold H. Persons,* Assistant Attorney General of Wisconsin, and *James Ward Rector,* Deputy Attorney General, with whom *Mr. John E. Martin,* Attorney General, was on the brief, for petitioners. *Mr. Martin A. Schenck,* with whom *Messrs. Edward Cornell* and *G. Burgess Ela* were on the brief, for respondent. Reported below: 233 Wis. 305; 289 N. W. 685.